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CHAPTER EIGHT

THE CRIMINAL/CRIMINOLOGICAL EVALUATION OF VERTICAL ARRANGEMENTS - PART II

"Basically all our similarities are different." [1]

A)INTRODUCTION

This chapter will examine first the informal resolution and individual exemption of vertical arrangements. Then, DGIV's approach to the trial and sanctioning of vertical agreements will be assessed.

B)PROCESS AND SUBSTANCE - INFORMAL RESOLUTIONS - COMMISSION POWERS

1)Types of Informal Resolution [2]

In order to evaluate the informal resolution of distribution arrangements it is intended to examine here:

a)those formally prosecuted cases already discussed which appear to have received some form of plea-bargain [3], and ;

b)a selection of distribution cases which have been negatively cleared [4].

2)The Commission's Approach to Informal Resolutions

It is intended to examine here the Commission's enforcement approach in the above-mentioned cases and consider whether DGIV characterises, constructs and analyses these cases differently to other formally prosecuted cases, resulting in a different method of resolution. First, the Commission's classification and legal assessment of

informal settlements will be discussed, then the factors influencing informal resolution will be evaluated.

a)Classification and Analysis of Informal Resolutions

As discussed above, the formally prosecuted cases subject to negotiated settlement were classified as criminal/quasi-criminal and were subject to limited legal and economic evaluation[5]. This is certainly true of cases like *Viho* and *Dunlop/Slazenger*. Indeed, *Viho* was described and analysed as a 'per se' offence[6].

This is in stark contrast to DGIV's treatment of those cases receiving clearance. Here, the Commission appears to have characterised the cases as entirely administrative matters and adopted a reasonable and helpful approach towards the notifications. This is particularly evident in DGIV's lenient attitude towards clauses likely to infringe Art.85(1) [7]. This generous approach is echoed in DGIV's interpretation of Art.85 and its analysis of these agreements. In each case, the arrangement contained clauses likely to offend the *Metro* criteria [8] and thus restrict competition. Six of these agreements contained restrictions designed to prevent parallel imports [9]. Four included quantitative restrictions regarding turnover, stocking or promotion requirements [10]. Two openly attempted to impose an resale price maintenance (rpm) system, whilst three agreements employed selection criteria which exceeded the boundaries of objective necessity and were open to abuse [11]. In each case, DGIV's response to these violations was not to treat them as having an anti-competitive object and commence formal prosecution. Instead, it employed alternative tactics. In two cases, DGIV used the malleability of the criteria under consideration to place a favourable construction on the offending terms enabling them to fall outside Art.85(1) [12]. In *Villeroy Boch*, stocking, promotion and minimum turnover requirements, usually regarded as unacceptable quantitative restrictions, were described by DGIV as "not strictly qualitative", but not appreciably affecting competition [13]. Elsewhere, DGIV began negotiations aimed at modification [14]. Following modification, the agreements were subject to a similar formalistic analysis as

occurred under formal prosecution, with the result that all agreements were found to fall outside Art.85(1).

The rationale underlying DGIV's approach in these cases is far from clear. Largely, the Commission's interpretation and analysis is the same. Clauses exceeding the *Metro* criteria are held to infringe Art.85(1). But here, the DGIV's response is very different. In these cases, DGIV is prepared to use its control of enforcement to place a favourable case construction on distribution terms and undertake negotiations aimed at modification and informal resolution rather than formal prosecution.

b)Influencing Factors

This section will examine the possible factors affecting the likelihood of an informal resolution and apply them in the vertical context in an attempt to shed some light on DGIV's variable approach. The main factors which will be considered are : the type of violation involved ; termination or modification of the conduct ; notification of the agreement and the firm's co-operative attitude [15]. The influence of termination or modification of the practice on informal settlement is unclear. All seven negatively cleared cases underwent modification, whilst in five of the possible plea-bargains, the offending conduct was terminated [16]. But, negotiated settlement does not necessarily require termination. In *Dunlop/Slazenger*, DGIV were unsure whether the conduct had been terminated, but some form of bargain appears to have occurred [17].

Nor does the type of violation seem to control the likelihood of a settlement. Cases involving export bans and similar restrictions, clearly regarded elsewhere by DGIV as criminal activity, received very different treatment here. Five of the negatively cleared cases containing such restrictions were negotiated, six of the formally prosecuted cases were bargained, whilst a further four formally prosecuted cases were enforced against in full [18]. Similarly, attempts at rpm or price discrimination, generally treated by DGIV as inherently anti-competitive, underwent very different forms of enforcement [19]. Two negatively cleared cases attempting to

impose rpm were modified, six formally prosecuted cases using bans to maintain price differentials were bargained, whilst a further four formally prosecuted cases were enforced in full [20]. Further discrepancies exist in DGIV's approach to quantitative restrictions such as minimum turnover requirements and attempts to impose class of customer restrictions. Again, the same pattern of differential treatment occurs. Notified agreements in *SZG*, *Kenwood*, *Murat* and *Villeroy Boch*, imposed requirements relating to minimum turnover, promotion and stocking. *Villeroy Boch* also imposed customer restrictions. Yet, these cases were negotiated and modified. In contrast, the notified agreements of *Ideal* and *Grohe* imposed similar restrictions, but were formally prosecuted in order to elicit modification [21]. A similar pattern of differential treatment is seen in DGIV's approach to the requirements that distribution systems must not be operated discriminatorily and must not impose excessive restrictions [22].

Notification has been suggested as a possible factor influencing DGIV's choice of enforcement method [23]. Again, the weight of this factor is dubious. All seven cases receiving negative clearance were notified, but so were several other cases in the study. The former were negotiated and modified, the latter were formally prosecuted [24].

A further influencing factor which seems particularly important to DGIV is what it describes as a 'constructive attitude'. Here, assistance with investigation, relinquishing the right to a hearing or a willingness to take remedial action may affect both the mode of enforcement and the type and level of sanction imposed. In the study, all seven negatively cleared cases clearly co-operated by modifying their agreements. The Commission rewarded this with the negative clearance of their agreements [25]. In several formally prosecuted cases, the firm's co-operation and willingness to institute compliance programmes resulted in a plea-bargain and reduction of fines [26]. In other cases where evidence of a plea-bargain is less clear, co-operation did earn some reduction in fines [27]. But, co-operation does not always guarantee the Commission's leniency. In *Ford*, the undertaking waived its right to a hearing. This co-operation went unrewarded [28].

C)PROCESS AND SUBSTANCE - DEFENCE RIGHTS [29]

It is now necessary to consider the ambit of defence rights in informal prosecution. As with horizontal cartels, defence rights will be assessed by examining the legal value of informal settlements. As the limited legal security of negotiated settlements has been explored fully in Chapter 5, it will not be examined further here. Instead, this section will concentrate on assessing the legal value of both negatively cleared cases and comfort letters [30]. It will then go on to consider the implications of this evaluation on the informally resolved cases under consideration, noting the effect of DGIV's enforcement choices and the private nature of settlements on defence rights.

Comfort letters are of limited legal value [31]. The main cases examining the legal security of comfort letters are the *Perfumes* cases [32]. These cases concerned the notification of selective distribution systems. After modification, comfort letters were issued. Their legal value was challenged in the national courts and the question was referred to the ECJ under Art.177 [33]. The manufacturers involved argued that comfort letters had the status of individual exemption and were binding on national courts. The ECJ rejected these claims, holding that they were merely administrative letters indicating DGIV's opinion and not binding on the Commission or national courts [34]. The ECJ's formalistic approach in these cases has been criticised. The Court's ruling appears to have been based on non-compliance with Reg.17 (primarily the issue of publication). It thus avoided having to rule on whether in substance a comfort letter was equivalent to a decision [35]. Stevens argues that this formalistic approach ignores the fact that comfort letters may be decisions under Art.189 and therefore reviewable "acts" under Art 173 [36]. Caselaw would suggest that although this is possible, the issue is far from settled [37].

Concerns over the poor declaratory value of comfort letters led, in 1982, to the introduction of 'formal' comfort letters [38]. However, as formal letters are rarely used they have done little to allay concern over the legal value of comfort letters [39].

In summary, comfort letters are without real legal significance. As they are not "decisions" and may not be "acts", they are not reviewable by the Court. They do not bind the Commission, national courts, competition authorities nor third parties. But, they do bind defendants.

In contrast, negative clearance is a decision of the Commission [40]. DGIV's decision here means that the agreement is not caught by Art.85 because it does not restrict competition or has no appreciable effect on inter-state trade. Limited Commission resources mean that such decisions are only issued in borderline cases where issues of political, economic or legal significance are involved [41]. As decisions, firms involved in negative clearance have the right to be heard and have full rights of appeal [42]. However, pressures placed on defendants during the course of resolution proceedings may significantly undermine the legal security of these apparent safeguards. DGIV's broad construction of violations, its formalistic analysis, limitations on disclosure, the threat of prosecution and/or substantial fines and undisclosed political influences may result in firms involved in all types of informal settlement feeling constrained to settle on the Commission's terms [43]. Consequently, no cases in the study challenged the resolution of their agreement [44]. The study of the negotiated settlement of horizontal violations noted DGIV's inclination to suspend rather than terminate proceedings and to place defendants accepting a settlement under constant Commission review. There is no evidence of this occurring in any of the plea-bargained or negatively cleared vertical cases.

The curtailed legal value of informal settlements indicates an absence of procedural protection for defendants involved. The apparent advantages to the Commission and the disadvantages to defendants have been reviewed fully in Chapter 5. Broadly, the defendant's position is characterised by an absence of natural justice. He has no right to be heard, no right to disclosure and no right to an independent tribunal. Negatively cleared cases are little better off. In practice, the rights they have are not exercised in return for negotiation and modification of their agreement. In contrast, DGIV controls every aspect of informal resolution. Its strong bargaining position allows the Commission to pursue political and pragmatic goals in the absence

of procedural controls or appellate review. The disparity between the two positions has provoked trenchant criticism and calls for reforms enhancing the legal status and transparency of resolution proceedings [45]. In particular, Stevens asserts that DGIV's current use of comfort letters is "unacceptable" as it routinely places expediency before legal certainty [46]. Nevertheless, comfort letters, and indeed other types of informal resolution, continue to be a "crucial tool" in the Commission's enforcement policy [47].

D)CONCLUSION - INFORMAL RESOLUTIONS

It is clear from the above examination that all distribution agreements are subject to the same broad interpretation and formalistic analysis. Clauses offending the *Metro* criteria are classified as criminal/quasi-criminal. Thus, as in horizontal cartels, the characterisation of the behaviour controls construction, evaluation and the *need* for enforcement. But, it does not appear to dictate the *method* of enforcement. Numerous examples exist in the study of similar restrictions being treated dissimilarly. Some are negotiated, modified and given negative clearance. Some are prosecuted and bargained, whilst yet others are subject to the full weight of the Commission's prosecution powers. Why these differences occur is not immediately clear. The evaluation of possible factors influencing the likelihood of an informal reslution has shed no light whatsoever on the rationale underlying DGIV's enforcement choices. What it has illustrated is the breadth of the Commission's discretion over enforcement.

The arbitrary nature of DGIV's choices is equally clear. No two cases illustrate this better than *AEG* and *Kenwood* [48]. On notification, *Kenwood* contained several offensive clauses of a type which DGIV is usually only too willing to openly prosecute in the interests of deterrence [49]. Yet, DGIV negotiated a settlement. In contrast, in *AEG*, whose distribution system had operated successfully within EC competition rules for several years, was formally prosecuted following allegations of

discrimination. Surely, cases like *AEG*, where the basic agreement is fundamentally sound are eminently suited to negotiation and modification rather than formal prosecution. Contrasts like this seem to give credence to *AEG's* claims of prejudice and injustice.

In addition, the study has illustrated that this highly discretionary approach takes place largely in the absence of guaranteed procedural safeguards. DGIV's curtailment of defence rights has enormous resource value, permitting the Commission's enforcement choices to proceed unhindered and enabling DGIV to elicit the settlement it desires in the vast majority of competition cases.

Whilst DGIV's enforcement choices are impossible to reconcile with objective criteria, the study has suggested that they are entirely consistent with DGIV's incremental manipulation of the law for political and pragmatic objectives. The Commission's domination of the process, the absence of transparency surrounding settlements and the lack of accountability over enforcement choices all permit DGIV to select the most expedient prosecution method and achieve as political or pragmatic an outcome as it requires in the absence of any real challenge. In particular, the enormous pragmatic benefits to be derived from this streamlined appproach may account for the lack of consistency in DGIV's enforcement choices. Consequently, which method of enforcement will be employed in any individual case is largely unforseeable. This has a significant impact on legal certainty. It also affects the ultimate classification of distribution agreements, resulting in notable differences of characterisation. Those agreements subject to negotiation appear to be administrative matters ; those formally prosecuted as criminal offences. This examination of informal resolutions suggests that this characterisation may have significantly more to do with the arbitrary nature of DGIV's enforcement choices and its pursuit of political and pragmatic goals than the content of the agreement.

E)PROCESS AND SUBSTANCE - ART.85(3) - COMMISSION POWERS [50]

This section intends to examine the Commission's approach to the individual exemption of distribution agreements. The arrangements under consideration comprise all such agreements recently exempted by DGIV. Thus, the data derived from them will be numerically complete [51].

It is proposed to evaluate DGIV's classification and assessment of individual exemptions by examining the conformity of these arrangements with the *Metro* criteria. At each point, DGIV's justification for exemption under Art.85(3) will be discussed. During the course of this discussion, the Commission's attitude to these individual exemptions will be compared and contrasted with its approach in other distribution cases.

1)Classification and Assessment of Individual Exemptions

a)Cross Supplies

All the exempted agreements were closed systems banning sales to non-authorised dealers and some required that sales records be kept in order to monitor compliance with the system [52]. Some of these agreements also placed restrictions on active sales in another dealer's territory [53]. Third parties in four cases complained that closed distribution systems served to increase market rigidity and hinder parallel trade [54]. These concerns were dismissed by the Commission. Instead, DGIV insisted that these requirements were indispensable to the maintenance of the system and provided dealers with an incentive to commit resources to pre- and after- sales services, though in most cases DGIV imposed reporting condititons [55]. Elsewhere, closed distribution systems have received negative clearance [56]. In comparison, similar monitoring

requirements have been construed by DGIV as indirect export bans and formally prosecuted [57]. Nevertheless, in *Grundig*, DGIV asserted that such verification requirements do not have an independent anti-competitive character [58].

b)RPM/Price Discrimination

In *AMP*, the agreement contained price-fixing clauses. In its Art.177 ruling, the ECJ took a lenient view, maintaining that some rpm was necessary because of the special characteristics of the market. Consequently, such agreements were suitable for exemption [59]. Despite maintaining its general opposition to price-fixing, DGIV has stated its intention to grant *AMP* an exemption, once again citing the special characteristics of the market [60]. This approach is in stark contrast with the Commission's normal view which condemns price-fixing as possessing an inherently anti-competitive object without any examination of its market context. Certainly, all distribution cases containing export bans seeking to support price discrimination and the two negatively cleared cases attempting to impose rpm were attacked by DGIV [61].

c)Customer Restrictions

In *Grundig* and *Saba*, restrictions were placed on wholesalers reselling to private customers. This was held to fall outside Art.85(1) as the provision merely reflected the proper division of functions between wholesalers and retailers [62]. Moreover, in *Ivoclar*, sales were restricted to dentists, laboratories, universities and hospitals. Similar restrictions were placed on wholesalers in *Ideal* and *Grohe*, allowing sales only to plumbing contractors [63]. In all three cases, DGIV admitted that the provision infringed Art.85(1) because it restricted the commercial freedom of the parties. However, the manner in which DGIV proceeded to deal with the issue varied considerably. In *Ivoclar*, DGIV granted an individual exemption, finding that the restriction was necessary to achieving substantial improvements in the distribution of Ivoclar products and ensuring a prompt supply to dentists. In addition, the restriction

helped to maintain professional standards of usage from which consumers would benefit. In their defence, *Ideal* and *Grohe* advanced similar arguments to those DGIV had used to support the exemption in *Ivoclar*. But DGIV's response here was to find that the provision was a "serious restriction" of competition the disadvantages of which heavily outweighed any efficiency gains in distribution. Moreover, it insisted that such a requirement was not indispensable as sale and installation were two entirely separate functions [64].

d)Qualitative/Quantitative Criteria

In several agreements concern was expressed that the selection criteria exceeded objective requirements or were open to abuse [65]. In *Yves St Laurent* and *Parfums Givenchy*, the notified systems made admission to the system dependent on the manufacturer deeming an outlet in a given area economically viable. In both cases, third parties complained that the vague nature of the selection criteria could result in discriminatory treatment. In each case, DGIV negotiated a modification of the criteria so that outlets meeting the qualitative criteria must be admitted within a specified time period, thus eliminating the possibility of discrimination [66]. In *Saba II*, it was argued that the admission criteria were discriminatory because they effectively excluded modern forms of retail outlets like discount stores. Moreover, the fact that the manufacturer had sole control over admissions was felt to increase the likelihood of abuse [67]. Consequently, DGIV required modification of the selection process so that the admission decision could be delegated to wholesalers, thereby reducing the likelihood of arbitrary practice. In contrast, in *Villeroy Boch*, DGIV issued negative clearance to a system which gave the producer sole control over admissions [68].

A major challenge to DGIV's approach to admission criteria came in *Metro II* who argued that Saba's system was applied arbitrarily and that DGIV had failed, in granting exemption, to take proper account of the effect that the concentration of distribution systems on the market had on competition. Metro's submissions were dismissed. On the issue of market rigidity, the Court held that Metro had failed to

establish that the concentration of systems had effectively hindered workable competition. Nor had it advanced sufficient evidence to show that the discriminatory operation of Saba's system was anything other than isolated instances[69].

In contrast, in *AEG*, a formally prosecuted case, DGIV insisted that the the small number of cases involved did not establish the non-systematic nature of the apparent discrimination. Here, the burden was on the defendant to prove that there was no general policy of discrimination[70]. In all of these exempted cases, DGIV justified exemption by stating that the admission criteria brought distribution improvements by ensuring that only dealers who were able to meet professional standards and were able and willing to maintain the brand image were admitted to the system[71]. Elsewhere, other admission criteria have been treated very differently. For instance, in *Grundig*, requirements to display and stock a full range of products were held to be quantitative, but were exempted. Yet, in *Villeroy Boch*, an obligation to display goods attractively and not too close to competing brands and to maintain continuity of supply was held to be qualitative and negatively cleared[72].

A number of agreements imposed quantitative restrictions relating to minimum turnover, stocking and promotion requirements. In particular, *Yves St Laurent* and *Parfums Givenchy* imposed obligations covering all three requirements[73]. Third parties in these cases criticised these requirements as restricting the number of dealers who could enter the market and likely to increase market rigidity[74]. DGIV agreed that the obligations did restrict competition because they resulted in dealers meeting the qualitative criteria being excluded from the system because they could not satisfy these additional quantitative criteria[75]. Again, DGIV held that the requirements were necessary to achieve various distribution efficiencies, these advantages being of benefit to consumers[76].

Other agreements imposing similar obligations have been alternatively negatively cleared or formally prosecuted. In *Villeroy Boch*, the highly competitive nature of the market permitted stocking and promotion requirements to be negatively cleared despite their restrictive nature. Conversely, similar obligations in *Ideal* and *Grohe* resulted in formal prosecution[77].

e)Product

In *Grundig* and *Saba*, it was argued that distribution systems for consumer electronics were no longer required in view of their quality and reliability [78]. Nevertheless, DGIV granted exemptions in both cases on the basis that such technically sophisticated products necessitated selective distribution. In *IBM*, whilst granting negative clearance, DGIV doubted whether computer products would always require the protection of a selective distribution system. In *Ivoclar*, a distribution system for dental products was granted exemption on the basis that it ensured prompt supply and professional use of such products. Conversely, in *Ideal*, a system for the distribution of plumbing fittings was refused exemption. DGIV held that the products were not sufficiently technically sophisticated to warrant selective distribution, despite assertions that the system was needed ot ensure professional standard of fitting [79].

F)PROCESS AND SUBSTANCE - DEFENCE RIGHTS

This section will examine the existence and scope of defence rights in the context of the individual exemption of distribution systems. As decisions, individual exemptions give defendants the right to be heard and a right of appeal [80]. However, the fact that individual exemptions are negotiated settlements places limits of the exercise of these rights. Often, these procedural safeguards are waived in return for negotiation and exemption of the agreement. An insistence upon procedural rights risks enforcement by formal prosecution [81]. This relinquishing of defence rights is evidenced in the study by a complete absence of formal challenges to DGIV's enforcement approach. Thus, once again, negotiations may be conducted in conditions most advantageous to the Commission. In this context, DGIV utilises its control of enforcement to impose conditions on exemption, enabling it to exercise long-term control over the undertakings involved. In four of the exemptions in the study, reporting conditions

were imposed [82]. Whilst in *AMP*, conditions relating to price-fixing and classes of customer supplied have been outlined [83].

G)CONCLUSION - ART.85(3)

This examination of the Commission's individual exemption of distribution agreements reveals that DGIV does treat these cases differently to other vertical agreements. Those restrictions contrary to *Metro* criteria are still held to infringe Art.85(1), but here, they are exempted rather than formally prosecuted or negatively clear as has been the case with other agreements in the study. Whether DGIV's justifications under Art.85(3) are sufficient to explain these differences is open to debate. Examination of the study reveals that DGIV's assessment of these exemptions is again very formalistic. Thorough economic evaluation is invariably absent [84]. As a result, the quality and quantity of evidence relied upon in support of DGIV's findings is often both limited and bland in nature with little reference to a clear standard of proof. Typically, the Commission's justification for an individual exemption says little more than the arrangement will produce an efficient distribution system of competent dealers which will serve to enhance brand image and/or maximise exploitation of the market. These advantages permit DGIV to view normally inherently anti-competitive requirements as having no independent anti-competitive character and as being indispensable to the achievement of the aforementioned benefits. In consequence, competition is not eliminated.

Chard has criticised the Commission's formalistic analysis under Art.85(3) as less than satisfactory. He asserts that it is an inadequate basis for assessing the true pro/anti-competitive effects of an agreement. The same problems with evaluation relating to the perceived pro/anti-competitive nature of qualitative/quantitative restrictions discussed in formal prosecution apply equally here [85]. He argues that this had resulted in an over-strict application of Art.85(3) with the consequence that many

Commission decisions have hindered rather than enhanced competition [86]. Goebel, too, has criticised the formalism of both the Commission and Court, particularly the Court's deference to DGIV's often inadequate fact-finding/economic analysis and their failure to tackle important legal issues [87]. He has also criticised DGIV's paternalistic approach to consumer benefits, arguing that, as market investigations into consumer preferences are cheap and easy to undertake, there is no need for DGIV to assume it knows what is best [88]. Both DGIV's and the Court's refusal to delve into the role played by market rigidity in the elmination of competition has been condemned. Both institutions have avoided examining the nexus between the need to protect distribution methods and that of maintaining adequate levels of competition [89].

The Commission's formalistic treatment of distribution cases seeking individual exemption has produced further examples of similar restrictions being treated differently. For instance, the provisional decision in *AMP* which permits price-fixing conflicts with DGIV's enforcement of other distribution arrangements. In *AEG*, both the Court and Commission expressed concern that selective distribution systems could be used for price-fixing and punished AEG accordingly [90]. DGIV's explanation in *AMP* that the special characteristics of the market justified the exemption do not seem to defend adequately its decision here, particularly in the light of DGIV's refusal to exempt crisis cartels attempting rationalisation by price-fixing and who can also boast special market conditions.

The flexibility of both the *Metro* criteria and the conditions of Art.85(3) give the Commission considerable latitude in granting individual exemptions, allowing it to exempt technically anti-competitive agreements where it is politically or pragmatically desirable to do so. In particular, the significant pragmatic benefits accruing from this approach may account for DGIV's enforcement choices. However, this policy also creates significant legal uncertainty. The apparently arbitrary nature of DGIV's enforcement makes it difficult to forecast whether or not a particular restriction will infringe Art.85(1) and how DGIV will apply Art.85(3) to it. The Commission's reasoning under Art.85(3) gives little indication of the precise factors controlling decision-making, whilst the lack of transparency surrounding exemption negotiations

only exacerbates matters. DGIV's erratic approach also affects the final classification of these arrangements. Once again, the Commission's negotiation of such cases gives the individual exemption of distribution agreements an administrative character. As noted previously, this may owe more to DGIV's unpredictable exercise of its discretion than the restrictive content of the agreements. What does remain constant is the limited character of defence protections. Here, they are constrained by the negotiated nature of the exemption process, again highlighting the disparity between prosecution and defence positions. Nevertheless, these deficits do serve a purpose. All play their part in assisting DGIV to secure its political and pragmatic objectives.

H)CONCLUSION - ALL METHODS OF PROSECUTION

Before undertaking the criminology analogy of the prosecution of vertical cases, the Commission's overall approach to the prosecution of distribution cases and the effect on defence rights will be summarised.

DGIV's prosecution of vertical cases is characterised by its arbitrary nature and disparate outcomes. But, some common ground does exist. The study has shown that all distribution agreements undergo the same broad construction and formalistic analysis. Provisions offending the *Metro* criteria are classified prima facie as criminal/quasi-criminal. But, whilst this initial characterisation controls the need for enforcement, it certainly does not dictate the type of enforcement or the eventual outcome. The Commission's subsequent prosecution choices disclose numerous examples of similar agreements receiving disparate treatment. Those selected for formal prosecution are classified as inherently anti-competitive and treated as criminal matters. These cases receive uncompromising prosecution and significant fines. Elsewhere, in the face of similar restrictions, DGIV pursues an eminently more reasonable course, seeking the negotiation and modification of problematic clauses. So, whilst such restrictions are initially classified as criminal, the Commission's

treatment of them is entirely administrative. As a result, such cases are individually exempted or even negatively cleared. The basis of DGIV's approach is unclear. The study has shown that the Commission's choices cannot be reconciled with the *Metro* criteria. Nor do the justifications in case reports adequately explain the differences in treatment. Invariably, DGIV's reasoning here has been anodyne and contradictory. All this suggests that this disparate approach owes more to the Commission's erratic use of its discretion than the actual content of the agreement. This policy has led to two particular problems. First, DGIV's repeated refusal to undertake searching examination of the true pro/anti-competitive effects of distribution agreements leaves its decision-making economically dubious. Secondly, DGIV's failure to explain fully the reasons behind its choices and its inconsistent treatment of restrictions, particularly those relating to turnover, stocking and promotion, create significant legal uncertainty. Consequently, which prosecution method a given case will receive and its eventual outcome are unforseeable. The fact that DGIV is able to vary its enforcement method at will, without reference to objective criteria and with such disparate results, raises questions over the equity of the Commission's choices. Indeed, that DGIV's choices are impossible to reconcile with objective criteria suggests that the real rationale is hidden from review. One must question why the Commission feels obliged to conceal it.

DGIV's enforcement choices have a major impact on the scope of defence rights. The Commission consistently views defence rights as entirely a matter of administrative fairness. This allows DGIV to control the breadth and effectiveness of procedural safeguards and to ensure that enforcement needs remain paramount. In particular, the Commission's attitude to the disclosure of information significantly curtails the defendant's ability to mount a meaningful defence. Moreover, in all forms of informal settlement, including negative clearance and individual exemption, the defendant is even more vulnerable. Complaints over the absence of procedural protections or refusals to relinquish existing rights risk incurring the displeasure of the Commission. A more formal method of prosecution is likely to follow.

Most importantly, the study reveals DGIV's enormous discretion over all aspects of prosecution ; classification, case construction, prosecution method and ultimately outcome. Whilst the Commission has never articulated the true rationale underlying its inconsistent approach, the case study bears evidence suggesting that DGIV's interpretation of competition rules has been tailored to meet political and pragmatic goals. By creating uncertainty over the construction and application of Art.85, the Commission fashions for itself a considerable advantage, increasing its own prosecution chances, whilst diminishing the defendant's ability and opportunity for successful challenge. Step by step, this policy of uncertainty and inconsistency ensures the cost-effective control and eradication of all hindrances to integration. So, whilst this strategy may produce some economically questionable decisions, it nevertheless continues to serve the 'higher' goal of political unity and ultimate control by the Commission.

I)CRIMINOLOGICAL ANALOGY - PROSECUTION

As a full criminological analogy was undertaken in the discussion of horizontal cartels, this section will briefly examine the similarities between the Commission's prosecution of vertical violations and that of the English criminal process, assessing DGIV's conduct against traditional models of criminal justice[91].

Both systems display a similar approach to prosecution. Both possess a discretion to prosecute which is used to the system's advantage. Both employ the flexibility of the law to construct and analyse cases in a way which ensures the required result ; whether this may be conviction or resolution. Each system possesses and employs various methods of prosecution. Whilst many cases are formally prosecuted, each jurisdiction shows a preference for informal resolutions. This is particularly evident in the Commission's approach towards distribution arrangements. DGIVs plea-bargaining, individual exemption and negative clearance of many such

cases discloses a strong preference for negotiated settlement. However, in neither jurisdiction are defendants able to forcast with any certainty which method of prosecution they will undergo.

Both jurisdictions have a similar approach to defence rights. Every opportunity is taken to limit the scope for and effectiveness of defence challenges to the prosecution momentum. Specifically, each system uses its dominance of the process to curtail the amount and quality of evidence available to defendants. In each process, defendants involved in informal resolutions are constrained to waive defence rights and negotiate settlements in the absence of procedural protections. Most fundamentally, each system employs its control over enforcement to ensure that neither substantive nor procedural rules hinder enforcement. As a result, in each jurisdiction the disparity between the prosecution's significant powers and the defendant's weak procedural rights is evident.

As the problems and consequences of this approach have been examined in Chapter 5, they will not be explored further here. Instead, a brief analysis of the Commission's approach against traditional criminal justice models will be undertaken. The discussion of horizontal noted that both processes adhered to the crime control model. A similar pattern is illustrated here. At prosecution, the emphasis for crime control is on the speedy cost-effective prosecution of defendants. Guilty pleas and bargaining are particularly important. Once again, the end justifies the means. Thus, the promotion of political and pragmatic aims validates DGIV's domination of enforcement and the use of its powers to increase conviction prospects and curtail defence rights. These twin objectives also legitimise the Commission's ambiguous interpretation of the substantive law, its formalistic analysis and preference for informal resolution, all of which assist in the attainment of DGIV's desired outcome with minimum cost and effort. Again, it must be concluded that for the Commission crime control is paramount. In the long term, this may mean that similar consequences to those seen in the English justice system are equally inevitable.

J)PROCESS AND SUBSTANCE - TRIAL AND SENTENCE - COMMISSION POWERS

The following discussion will examine how the Commission exercises its powers of decision and sanction in vertical cases, considering the impact of the violation's classification and DGIV's case construction on the type and level of sanction imposed

As the background information on the trial stage of proceedings has already been provided in an earlier chapter, this section will concentrate on the findings of the case study.

1)Decisions

Once again in the study, the Commission made consistent use of its powers to order termination and impose conditions controlling the defendant's conduct. Of the sixteen formally prosecuted cases, in six cases DGIV imposed 'cease and desist'/'like effect' orders. In a further nine cases, DGIV made 'cease and desist' orders alone [92]. Of these cases, two features are noteworthy. First, the increased level of co-operation by defendants involved in distribution cases meant that many violations were terminated prior to the Commission's decision. Thus, in five cases, DGIV's 'cease and desist' order was of declaratory value only [93]. Secondly, in three cases, the Commission took the opportunity to impose conditions ensuring the permanent eradication of the export ban [94]. For instance in *Camera Care*, DGIV ordered the termination of particular conduct relating to the export ban and required Hasselblad to inform distributors and dealers that cross supplies were permissible, and that they were free to set their own prices. In addition, Hasselblad were obliged to inform the public that there would be no discrimination with regards to after-sales service of parallel imported goods. Moreover, Hasselblad, under threat of a periodical penalty payment, were required to inform DGIV within three months that these measures had been carried out [95].

In distribution cases, DGIV's discretion under Art.3 was used quite clearly to secure economic integration, specifically requiring termination of any conduct hindering this objective. This ability to exert continuing control over the commercial activities of undertakings is penal in both nature and use. Whilst the precise impact of the Commission's case construction on decisions is difficult to establish with any clarity, it would seem that the formalistic assessment of distribution agreements serves only to augment the criminality of the conduct. This inevitably affects the type and level of sanction imposed.

2)Fines

a)Factors Influencing Fining

As noted previously, the guidance controlling DGIV's fining powers provides it with extensive freedom in the choice and weight of factors influencing its fining decision. This section will first consider those factors in the case study which the Commission treated as aggravating and then those as mitigating the level of fine imposed[96].

i)Intention/Negligence

In the study, DGIV's classification of these violations was unequivocal. In the majority of formally prosecuted cases, the Commission had no doubt that the offence was intentional. In *Sandoz* and *Dunlop/Slazenger*, DGIV was more equivocal, finding that the violation was either intentional or negligent. In *Viho*, the infringement was characterised as "at least negligent" [97]. This is a remarkable finding for an offence described and prosecuted throughout as a per se offence. Though it is perhaps less remarkable given that *Viho* was the subject of a plea-bargain. This case serves to illustrate the significant impact that plea-bargaining has on the ultimate degree of culpability.

The Commission provided very little evidence to support its conclusions. Invariably, DGIV circumvented the evidential problems encountered in establishing

culpability by stating that, given the clear-cut nature of the law in this area, the firms should have been aware of the illegality of their conduct [98]. In contrast with horizontal cartels, there was little direct reference to the covert or systematic nature of the conduct. But, in all cases, evidence that undertakings took active steps to prevent parallel trade and pressurised dealers served as evidence of the deliberate nature of the offences [99].

Only one firm challenged DGIV's finding. In *MDF*, Pioneer argued that the violation was not intentional as it was unaware of the illegality of the conduct. The ECJ dismissed the submission holding that Pioneer must have been aware that the conduct was liable to restrict competition and that this was sufficient to support a finding of intent [100].

The study again indicates that both the Commission and Court are prepared to accept a general awareness of anti-competitiveness as establishing the requisite degree of culpability upon which to impose a fine. Under this formula, very little is required to prove the 'intention' found in most cases. In these cases, this awareness of illegality seems to be based on little more than a statement that the law in this area is very clear. This approach suggests that DGIV's formalistic assessment of distribution arrangements extends to cover issues of culpability. Under this view, all export bans have an anti-competitive object and are therefore intentional in nature. Thus, the classification of the offence dictates the degree of culpability, and thus the level of fine imposed, with little substantive evidence required to support this conclusion. Plea-bargaining seems to have a potent effect, attenuating both the legal responsibility and moral culpability for the violation.

ii)Gravity

As with horizontal cartels, this section will examine how the behaviour of the parties and the anti-competitive impact of the violation affected DGIV's evaluation of the gravity of the offence.

With regard to the behaviour of the parties, factors revealing a willingness and determination to breach competition rules will increase the gravity of the offence.

Such components include the knowledge, role and conduct of each party, the systematic nature of the offence and evidence of recidivism [101].

DGIV's evaluation of factors influencing fines displayed the same lack of depth here as illustrated in the evaluation of horizontal violations. Both aggravating and mitigating factors were alluded to without any further discussion of their relevance or impact, making assessment of the Commission's approach difficult. A number of recurring themes were evident. These will be examined in further detail.

The firm's awareness of the anti-competitive nature of its behaviour was referred to frequently as an aggravating factor, often indicating a deliberate intention to infringe [102]. However, as already discussed, this factor owes more to DGIV's formalistic assessment than direct proof of intention.

The role played by the respective parties also affected the assessment of gravity. In most cases, the producer, as the driving force behind the ban, was singled out for heavier fines [103]. The Commission's attitude towards the effect that coercion to participate in a export ban has on the assessment of gravity is unclear. In some instances, DGIV has treated such pressure as mitigating but not entirely exonerating the behaviour [104]. Elsewhere, coercion has entirely exonerated a party [105]. To make matters worse, this conflicting approach has often occurred to different firms involved in the same case. Little explanation for the difference is provided, though size and financial status seem relevant [106]. In *Fisher Price*, no fine was imposed on Toyco who had played an active but subsidiary role under pressure in enforcing the ban. DGIV cited the small size and financial problems faced by the firm as the reasons for its decision. In *Dunlop/Slazenger*, AWS had played a similar role and was in considerable financial difficulty. Here, DGIV only reduced the fine [107].

A further aggravating factor is a firm's refusal to terminate the conduct or assist with enforcement. Given the high levels of co-operation and voluntary termination in the case study, only limited evidence of non-cooperation exists. In *Dunlop/Slazenger*, DSI refused to terminate the offending behaviour despite several warnings from DGIV. Moreover, it encouraged other firms to co-ordinate replies to DGIV [108].

Systematic abuse is viewed as especially aggravating. In the context of distribution agreements, this willing determination to breach competition rules is seen in the form of parties taking active steps to hinder parallel trade and coercing dealers to participate in export bans by threatening termination of dealerships and refusing to supply dealers who will not co-operate. These tactics were noted as aggravating elements in all cases receiving a fine [109]. In this context, DGIV has used case construction to evade limitation periods, thereby increasing the duration and gravity of the offence. In *Dunlop/Slazenger*, *Viho* and *Sandoz*, whilst the Commission did not use the term complex infringement, it did employ the same appoach. Here, DGIV insisted that documents obtained must be read together and can be taken as proof of a "continuous course of conduct", thus extending the duration of the infringements [110]. This case construction serves to heighten the perception of the criminality of the defendant's conduct, directly impacting upon the evaluation of gravity.

Certain features, namely collective responsibility and recidivism, which served to increase the gravity of horizontal offences, were not evident here. Though, DGIV has used the reasoning behind the concept of complex infringement to increase the culpability of vertical offences. Case construction affects the assessment in other ways. By classifying these violations as inherently anti-competitive, DGIV's formalism and broad construction of restrictive conduct serves to increase the perception of the calculated and wilful nature of the violation directly affecting the assessment of gravity.

Few cases appealed against the Commission's evaluation of their conduct. *MDF* directly challenged DGIV's assessment of gravity, asserting that it was entirely arbitrary and bore no relation to the nature and duration of the violation or the specific conduct of the parties. In response, the ECJ simply upheld DGIV's absolute discretion in evaluating fines [111].

In order to assess the anti-competitive impact of the violation, DGIV generally takes into account issues such as the nature of the violation, the importance of the product and firms involved and the overall legislative and economic context [112]. The

Commission tended to refer briefly to these issues in the study, but provided little additional information on how it affected its reasoning.

As with horizontal cartels, the nature of the violation was an important factor. In the study, DGIV consistently condemned export bans and similar restrictions having as their objective the partitioning of markets as being a "flagrant breach of the rules"[113]. Although, the level of the fines imposed in these cases varies considerably[114]. In assessing the impact on the market, DGIV takes into account the importance of both the product and the firms participating. All cases involved noted that the infringement concerned a major producer on the market, but failed to explain the precise relevance of this factor[115].

The importance of the product to the economy received little consideration. Presumably, this is because distribution agreements, unlike horizontal cartels, do not deal with major industrial products liable to undermine the economy. Though in *Camera Care*, DGIV did take into account the high individual value of the product and the fact that the anti-competitive impact on users might be considerable[116]. The economic effect of the practice on the market received equally scant analysis. Invariably, the Commission simply stated that the violation was serious but failed to explain the actual impact of the conduct on the market[117]. Indeed in *Camera Care*, DGIV openly admitted that it had been unable to assess the precise economic effect of the conduct[118]. In *AEG*, it was noted that the conduct had raised prices[119].

The legislative and economic context of the offence is also significant. However, other than to refer to the market position of those involved, the economic context of the offence received little attention[120]. In *John Deere*, the Commission did note that the agricultural machinery sector was in a depressed state[121]. Whilst in *Sandoz*, DGIV noted, in mitigation, that the market structure had been affected by domestic legislation[122]. The legislative context did merit discussion. In all cases receiving fines, the gravity of the offence was increased considerably by the fact that the conduct hindered market integration[123].

The Commission's approach to the assessment of gravity is of some concern. Analysis of anti-competitive impact is extremely limited. Further doubt is cast on its

validity by the fact that the problems inherent in assessing market impact are exacerbated by the limited nature of DGIV's formalistic assessment. Moreover, the Commission's antipathy towards export bans allows its formalistic evaluation of anti-competitive object to be substituted for proof of anti-competitive impact. In several cases, DGIV did not discuss anti-competitive impact, but simply relied on a statement that the violation was of an inherently anti-competitive type. The close nexus between the various components involved in the assessment of gravity means that anti-competitive impact is further augmented by DGIV's formalistic assessment of the wilfulness of the firm's conduct. The case study also illustrates that the Commission's political objective has a direct impact on its evaluation of gravity. Overall, the study reveals that DGIV's characterisation and construction of the violation in the earlier stages of enforcement significantly enhances the perceived gravity of the offence. The concern is that much of this finding is based on the Commission's formalistic assumptions and prejudices rather than sensitive analysis.

iii)Duration

The duration of the conduct must also be taken into consideration. In theory, the longer the duration, the greater the fine[124]. In the study, those violations of the longest duration did not necessarily attract the largest fine. For instance in *Sandoz*, the violation lasted 22 years and a fine of 800,000 ECU was imposed. In contrast, the offence in *MDF* lasted between 3 months and 2 years, yet a fine of almost 7m ECU was levied[125]. Violations of a similar length do not appear to receive a similar fine. In *National Panasonic* and *Fisher Price*, where the violation lasted three years, fines of 450,000 ECU and 300,000 ECU respectively were imposed. In contrast, offences of a similar period received much larger fines[126]. That the Commission is operating an increasingly penal fining policy does not appear to explain these inconsistencies. Whilst the latest fines imposed by DGIV have been in millions rather than thousands of ECU, fines of equal substance were being imposed by DGIV a decade ago[127]. These discrepancies suggest that the Commission's fining policy is arbitrary. No clear pattern exists. On appeal, both *MDF* and *AEG* complained of DGIV's prejudiced approach to their cases. It has already been noted that, at prosecution stage, AEG in particular,

received dissimilar treatment. As *AEG* and *MDF* have received substantially larger fines than those imposed in similar offences, it would seem that this discrimination has extended to the fining stage of enforcement. Moreover, the effect of DGIV's case construction of duration is unclear. As noted earlier in *Viho*, *Sandoz* and *Dunlop/Slazenger*, DGIV used a 'continuous conduct' approach to increase the gravity and duration of the violation. As a result, these three cases are some of the longest duration under consideration. But, although fines imposed are substantial, they are not perhaps as large as might be expected given the duration of the offences [128]. A probable explanation for this is that plea-bargaining or other mitigating factors affected the ultimate level of sanction [129]. It is difficult to be more certain about this. The lack of information given in case reports regarding DGIV's assessment of duration/gravity and whether plea-bargain occurred makes evaluation problematic.

iv)Mitigation

A range of mitigating factors may be taken into account [130]. As already noted, the depressed state of the market or the effects of legislation may mitigate a fine [131]. The economic effect of the conduct may reduce the fine. In *Fisher Price*, the declining effects of the ban partially mitigated the fine [132]. DGIV's attitude regarding how far coercion to participate in the offence will mitigate a fine is ambiguous. On occasion, the fine has been reduced, elsewhere no fine whatsoever has been imposed [133]. Similar confusion exists regarding the financial problems of individual firms [134]. In this context, it is notable that DGIV has shown a generous attitude towards SMEs involved [135]. In eight of the distribution agreements under consideration, co-operation and/or the institution of a compliance programme was a major mitigating factor [136]. On occasion, various other factors have been taken into account. In *AEG* and *John Deere*, the fact that the Commission was dealing with 'first' offences apparently mitigated the sanction, though fines here of 1m ECU and 2m ECU respectively make this hard to believe [137]. In *Tippex*, reliance on legal advice was treated as an extenuating circumstance.

The case study reveals that DGIV's treatment of mitigating factors is as ambiguous as its evaluation of aggravating elements. Invariably, the Commission

merely noted the extenuating factor. No explanation of the precise extent of mitigation was provided. This makes it impossible to assess the equity and consistency of the Commission's conduct. However, the lack of clarity provides DGIV with considerable discretion over the choice and weight of factors it takes into account in individual cases.

b)Fining Policy

This section will assess the actual level of sanctions imposed in the study, considering the characterisation and consistency of the Commission's fining powers [138].

i)Deterrence

Despite DGIV's obvious antipathy towards export bans and similar restrictions, the Commission's fining assessment in these cases made little explicit reference to the need for deterrence. In *Camera Care*, DGIV did state that the need to deter the individuals involved was taken into account in calculating the actual amount of the fine [139]. Elsewhere, deterrence was not explicitly referred to, though it was implicit in the numerous references to the seriousness of the offences and the threat they posed to economic integration [140].

ii)Tariff

Whilst no actual tariff of fines exists, DGIV takes into account such factors as turnover of the firms involved and profits derived from the infringement [141]. In this respect, the most notable feature of the study is the virtual absence of comment on such issues. Whilst DGIV did briefly refer to the party's market position, generally, the fining assessment did not mention issues of turnover or profit [142]. In *Sandoz*, the Commission did state, albeit briefly, that it had taken the economic importance of the firm and its turnover into account [143]. In *Camera Care*, DGIV stated it had taken account of the respective size of the firms concerned. But, it admitted that it had been unable to assess the amount of profits derived from the violation [144]. In *MDF*, the defendant argued that it was unlawful for the Commision to base its fine on turnover

as this bore no relation to the profitability of the firm [145]. The ECJ upheld DGIV's approach to fining [146].

iii)Fines in the Case Study

Fines were imposed in eleven of the formally prosecuted cases in the study [147]. First, it should be noted that the overall level of fines here is somewhat lower than that seen in horizontal cartels. But, this can probably be accounted for by the fact that, in many vertical cases, the number of participants are fewer than in horizontal cartels. Secondly, no clear pattern of fining is evident from the study. Sanctions range from several thousand ECU to several million ECU. No obvious reason exists for this. This study has already noted that there appears to be no clear correlation between the duration of offences and fine imposed. Nor can the difference be explained by an overall increase in levels of fines [148]. In these vertical cases, the market sector involved does not seem relevant. No single market has been singled out for stricter or more lenient treatment. Nor is there any obvious discrimination between firms from different MS [149]. Plea-bargaining does seem to have reduced the level of some fines, but as already noted, the lack of transparency in DGIV's approach makes the precise impact of this factor difficult to assess. The Commission's case construction also seems to have had some impact on fines. Those cases in which DGIV employed a 'continuous conduct' approach received some of the largest fines imposed, despite being the possible subject of a plea-bargain [150]. In short, levels of fines are consistently inconsistent. Having said that, fines of several million ECU seem increasingly more likely in both horizontal and vertical situations as the need to secure and maintain economic integration becomes more urgent [151]. Given this, the penality of DGIV's sanctioning powers is beyond doubt.

3)Conclusion - Commission Powers

This examination of the sanctioning of distribution agreements discloses the width of the Commission's discretion in both the type and level of sanction it imposes and in the choice and weight of factors influencing that evaluation. DGIV's sanctioning choices

have a long-term effect over the firms involved and are specifically geared towards eradicating threats to the political goal of integration. The choices also disclose the penal scope and character of DGIV's sanctioning powers.

The Commission's criminal characterisation of these violations, its formalism and case construction affect all aspects of the fining assessment, augmenting particularly the gravity and duration of violations. DGIV's penal characterisation of export bans as inherently anti-competitive facilitates proof of anti-competitive awareness, and thus sufficient culpability upon which to base a fine. By underlining the criminality of the conduct, this finding of wilful anti-competitive behaviour increases the gravity of the offence. The Commission's case construction also plays a part. Specifically, the notion of 'continuous conduct' serves to support the criminal and systematic characterisation of the offence, increasing both the gravity and duration of violations.

The evaluation of anti-competitive impact is also affected. DGIV's formalistic approach routinely allows anti-competitive object to be substituted for evidence of anti-competitive impact. A detrimental effect on the market is frequently assumed, but rarely proved.

Overall, the study suggests that DGIV takes every opportunity to exercise its discretion in favour of heightening the perception of the criminality of the conduct. Ultimately, this has a significant impact on the level of fine imposed.

Several aspects of the Commission's approach may be criticised. The most concerning feature is the almost total absence of the reasoning underlying DGIV's sanctioning decisions. In this respect, even less information is provided here than in the context of horizontal cartels. This lack of transparency makes DGIV's approach virtually impossible to understand or review. Moreover, the study has disclosed several examples of DGIV's inconsistent approach to fining. This ambiguity and inconsistency may serve the Commission's enforcement goals, but it does nothing to enhance legal certainty. Further problems exist. DGIV's reliance on formalism means that the fining assessment may owe more to the criminal classification of the offence and the Commission's prejudices than thorough analysis. Such an approach brings the

equity of DGIV's decision-making into question. To make matters worse, successful appeals against the Commission's fining decisions are difficult to achieve in the face of the Court's repeated deference to DGIV's discretion [152]. *MDF*, *AEG* and *Hasselblad* all challenged the disproportional and arbitrary nature of the Commission's fining decision. In all cases, the Court simply upheld DGIV's basic approach to sanctioning [153].

Most importantly, DGIV's approach demonstrates that it possesses penal sanctioning powers and is prepared to use them to their fullest extent in support of political and pragmatic aims. Indeed, the entire process seems geared to criminalising and penalising conduct hindering the political goal of market integration. Case construction and formalism are vital tools. Both serve to increase the criminality of the conduct whilst making the offence easier to prove. This not only benefits the political object but provides appreciable pragmatic advantages too.

K)PROCESS AND SUBSTANCE - DEFENCE RIGHTS

1)Independent Tribunal [154]

The discussion of horizontal offences revealed that complaints on this matter have been dealt with by insisting that the Commission is not a tribunal and by holding that defendants have failed to prove that DGIV's monolithic role has breached defence rights [155]. A similar pattern is revealed in distribution cases.

Only two formally prosecuted cases challenged DGIV on this issue. The most notable was *MDF* who argued that DGIV's monolithic role was contrary to Art.6 ECHR and therefore its decision was illegal. The ECJ dismissed MDF's argument as being "without relevance" and based on a "misunderstanding" [156], and imposed a requirement of integral fairness alone upon DGIV's conduct of enforcement. Moreover, the Court insisted that the present review procedure was perfectly adequate

for dealing with instances of procedural irregularity[157]. *Hasselblad* also complained of the absence of an independent tribunal, arguing that its right to be heard was worthless in the light of the Commission's biased attitude. Again, the defendant failed to adduce sufficient evidence to establish DGIV's bias[158].

The criticisms of this approach made in the examination of horizontal carel are equally applicable here[159]. In particular, arguments relating to the question of whether the Commission is a tribunal divert attention from the real issue. It is the *effect* of DGIV's decisions on defendants that is important and which necessitates strict adherence to such procedural safeguards[160]. Despite the Court's insistence that review procedures provide sufficient redress in cases of procedural impropriety, many would disagree, particularly given the difficult burden placed upon defendants at appeal[161].

This review reveals that DGIV again uses its control of the process to limit the defendant's right to merely a matter of integral fairness. This approach benefits the Commission by allowing it to pay lip-service to procedural fairness without hinderance to the effective enforcement of Reg.17. The Commission's task is made considerably easier by the virtual absence of defence challenge. From the defendant's viewpoint the situation is bleaker. DGIV's ability to manipulate the scope of this protection renders it virtually worthless.

2)The Right to be Heard

As with horizontal cartels, the effect of the HO, the Advisory Committee and inconsistencies between the SO and decision on the defendant's right to comment will be assessed in turn.

a)Hearing Officer

None of the distribution cases under consideration challenged or commented upon any aspect of the HO's role. Thus, his effect upon the enforcement of distribution cases cannot be assessed.

b)Advisory Committee [162]

As noted in the discussion of horizontal cartels, some disquiet exists regarding the exact role of the Advisory Committee and its impact upon defence rights [163]. The issue of greatest concern has been the non-disclosure of the Committee's opinion. Two cases in the study questioned the confidential nature of this report. In *Distillers*, AG Warner expressed unease regarding the secrecy surrounding the entire consultation process, particularly the Committee's failure to disclose its opinion. He questioned whether this was consistent with the fundamental principles of Community law. The Court here requested disclosure of the opinion in order to check for procedural irregularities, but they had to undertake not to disclose it to the defendants before access was permitted [164]. *MDF* asserted that the requirement that the Committee's report should remain cofidential should be construed to allow confidential disclosure to the undertakings involved. The ECJ dismissed this argument, holding that defence rights were limited to an obligation of integral fairness only. By doing this, the Court were able to rule that non-disclosure of the opinion did not breach defence rights [165].

Also the quality of the Committee's decision-making has been called into question. Evidence suggests that DGIV is able to manipulate the evidence going before the Committee. In *Distillers*, defendants complained that the Committee did not have the full facts before them as several important documents were not disclosed to the Committee. The Court here were not required to rule to procedural issues, but given the ECJ's approach to the Committee's opinion in *MDF* as being irrelevant to defence rights, it is unlikely that the challenge in *Distillers* would have succeeded [166].

A final challenge to DGIV's consultation with the Advisory Committee came in *Vichy*, who claimed that DGIV's failure to consult the Committee prior to taking an

Art.15(6) decision breached their fundamental rights. The Court upheld the Commission. Again, defence rights were simply based on a requirement of procedural fairness under which consultation with the Committee was not an issue[167].

The concerns regarding the unreviewable nature and the quality of the Committee decision-making have been discussed in depth in Chapter 6. This study shows the same problems occurring in the context of distribution cases. Again, the secrecy of the procedure and the lack of evidence as to the precise influence of the Committee's opinion makes it difficult to assess its impact on defence rights. Certainly, there is no evidence to suggest it protects defence rights, but evidence does exist indicating that it may infringe defendants' safeguards. Of particular concern is evidence suggesting that DGIV is able and willing to manipulate evidence going before the Committee. Why DGIV would do this if the Committee's opinion was of no relevance to the Commission's decision, as both DGIV and the ECJ insist, remains unexplained. This manipulation may have a serious impact on defendants, yet they are not afforded any opportunity to comment. Matters are exacerbated by the extreme burden placed on defendants. It is virtually impossible for defendants to show that a procedural irregularity altering the outcome of the case has occurred when the evidence proving this, ie the Committee's report, is withheld from defendants. Of further concern is the approach to defence rights taken by DGIV and the Court in this context. Both take every opportunity to place an extremely limited construction on the right to comment, ensuring that the Committee's opinion remains shrouded in secrecy. Again, one must question why.

c)Problems relating to the SO and Decision[168]

Here it is intended to evaluate the effect on the right to comment of problems relating to inconsistencies betwen the SO and the decision and resulting inadequacies in the reasoning of the final decision.

Six study cases complained that their right to be heard had been infringed because of such problems [169]. *AEG* argued that its right to comment was infringed

because the decision relied on documents not mentioned in the SO. *MDF* challenged the fact that the SO and decision were inconsistent regarding the duration of the two concerted practices [170]. Conversely, *Hasselblad* complained that the reasoning in the decision was inadequate because it was identical to that in the SO [171].

Sympathy from the Court has been limited. In those cases concerning non-disclosure of relevant evidence, the Court have been willing to rule that evidence as inadmissible and to re-assess the decision on the basis of the remaining evidence. For instance, in *MDF*, the Court held that the defendant had not been able to comment on the longer duration of the violations as stated in the decision and proceeded to reassess the violation on the basis of the shorter duration stated in the SO [172]. However, in all these cases, the Court took a very broad view of whether the evidence had been sufficiently notified in the SO [173]. What the Court have not been prepared to do is to uphold procedural integrity as being of value in itself and to penalise DGIV by annulling the decision on the basis of procedural impropriety [174]. Instead, the Court have taken the view that whilst defence rights have been infringed, the breach has not been sufficient to vitiate the decision [175]. Consequently, only one of these cases questioning inconsistencies between the SO and decision had its decision partially annulled [176]. Elsewhere, the Court have been even less sympathetic and dismissed complaints out of hand [177]. However, the CFI's recent decision in *AWS* seems to indicate a greater willingness to tackle procedural irregularites. Here, AWS complained that DGIV's decision infringed Art.190 because it failed to identify properly AWS's liabilty for violations following the defendant's taking over of the assets of another company. The CFI upheld the claim, finding that the lack of individuality in the reasoning of the decision meant that the decision did not contain sufficient detail to establish the defendant's liability [178]. As a result, the CFI annulled the decision insofar as it related to AWS.

The broad scope of Art.190 and the Court's previous willingness to uphold decisions breaching defence rights provides little effective protection for defendants. As a result, Art.190 regularly exercises little accountability over DGIV's decision-making. Permitted inconsistencies between the SO and the decision mean that the case

the defendant comments upon and the one he is convicted upon are not necessarily identical. This situation clearly limits the effectiveness of the defendant's right to comment. But, the situation is not entirely bleak. The CFI's approach in *AWS* shows that, where the Court is willing, Art.190 can exact telling control over DGIV.

In summary, although the defendant's right to comment at trial stage is recognised, DGIV seeks to limit its effectiveness in a number of respects. Whilst, the study discloses no appeals relating to the HO, this lack of challenge cannot be taken as an indicating an absence of problems. It may simply be due to the more compliant attitude of defendants involved in distribution cases. Indeed, a general absence of defence challenge has been a significant feature of this examination of defence rights in vertical cases. Problems relating to the effect of the Advisory Committee on defendants' protections have been noted. DGIV is able to control the quality and quantity of evidence going before the Committee which necessarily influences the Committee's opinion. This treatment has received the support of the Court. Together with the considerable evidential burden placed on defendants, this ensures that the consultation process remains shrouded in secrecy. Matters affecting the ultimate decision may be discussed without defendants even knowing about them, let alone having the opportunity to comment upon them. As such, the Advisory Committee offers no protection to defendants, rather it may pose a significant threat to their fundamental safeguards. The examination of distribution cases has revealed further evidence of discrepancies between the SO and the decision. Although there is no evidence here of the Commission altering the legal characterisation of violations as revealed in horizontal cartels, DGIV still attempts to use the latitude of Art.190 to its advantage. On occasion, it has taken the opportunity to extend the scope and gravity of offences by including information in decisions not notified to defendants. Whilst the Court have not supported blatant breaches, its earlier attitude towards procedural irregularities demonstrates a belief that effective enforcement is more important than the defendant's right to comment. Whilst these problems do little to enhance the effectiveness of the defendant's right to be heard, they do benefit the Commission,

enabling it to dominate the latter stages of enforcement unhindered by the opinions of others or by procedural requirements. The CFI's more recent approach to procedural matters provides a refreshing contrast, seeming to indicate an increased willingness to insist upon procedural integrity.

L)CONCLUSION - TRIAL AND SENTENCE

It is now necessary to summarise the character and scope of DGIV's powers and the defendant's rights at trial stage noting their respective value as enforcement resources. The study has illustrated the Commission's continuing control of enforcement and has highlighted the enormous discretion enjoyed by DGIV regarding both the type and level of sanction imposed and the factors influencing that assessment. Here, DGIV has used its powers penally to exert long-term control over undertakings. Its decision-making has been directed specifically towards assisting the integration goal. The Commission's criminal classification of offences, its case construction and formalistic analysis have had a profound effect on the exercise of its sanctioning powers. Not only have they affected the fining assessment, augmenting the gravity and duration of violations, but they also allow the sanctioning decision to take place in the absence of thorough market analysis. Specifically, DGIV's formalistic evaluation means that the Commission's fining assessment is based largely on assumptions of the anti-competitive nature and effect of undertakings' behaviour. Whilst the resulting lack of explicit reasoning has caused problems for defendants, the ambiguity it creates has benefited DGIV by concealing its decision-making from effective review. As such, this use of the 'law as a resource' permits the conviction and punishment of conduct jeopardising the integration goal. DGIV's formalism ensures that this outcome is achieved by the most pragmatic route.

In contrast with the Commission's considerable penal powers, defendants are in a significantly weaker position. DGIV again uses its control of enforcement to curtail

both the scope of defendants' protections and the influence of others involved in the process. Both the defendant's right to an independent tribunal and the right to comment are based on a requirement of integral fairness. As a result, defendants are unable to insist upon judgement by an independent arbiter. The effectiveness of the defendant's right to be heard is equally limited. Defendants often face difficulties in preventing or rectifying inconsistencies between the SO/decision, inadequately reasoned decisions or the questionable influence of the Advisory Committee. DGIV's discretion is also used to dominate other personnel in the process, thereby eliminating possible interference with the Commission's construction of conviction. In this way, DGIV is able to isolate defendants and control their knowledge and ability to comment upon the case against them.

In the past, DGIV's interpretation of defendants' rights has received the clear support of the Court. For both Commission and Court effective enforcement often appears to outrank due process. The tougher stance of the CFI to procedural matters leaves much resting on their continued preparedness to exact telling control over DGIV's activities.

Overall, significant discrepancies exist between the Commission's ability and willingness to impose criminal sanctions and the defendant's attenuated procedural protections. The Commission's continued domination of the process has been assisted by a notable absence of defence challenges to DGIV's use of its sanctioning powers. This disparity is of clear benefit to the Commission, allowing the unhindered pursuit of political and pragmatic goals. In so doing, it concludes the final stage in DGIV's incremental use of the 'law as a resource', improving conviction prospects appreciably and assisting the punishment of conduct endangering these goals.

M)CRIMINOLOGICAL ANALOGY - TRIAL AND SENTENCE

Having considered DGIV's application of enforcement powers at trial and sentence, it is now necessary to draw a criminological analogy. A full analogy of the two jurisdictions' approach to enforcement at this stage has been undertaken in Chapter 6. Thus, this section will briefly compare and contrast the approach of the justice system with DGIV's treatment of distribution arrangements, assessing the Commission's enforcement approach against the main criminal justice models.

DGIV's sanctioning of distribution agreements closely resembles the sentencing approach of the English criminal justice system. Both systems control enforcement and employ their penal powers to construct the legal context to suit their enforcement requirements. Both possess considerable sentencing powers and exercise wide discretion over the type and level of sanction and the factors influencing that decision. Both allow the sentencing assessment to be open to bias from a range of extra-legal influences, often resulting in the arbitrary application of sanctioning powers. Moreover, each employs case construction to reinforce the gravity of the offence and justify the imposition of penal sanctions. Finally, in each system the ambiguity surrounding the sanctioning process is used to conceal arbitrary practice and possible injustice from incisive review.

Similar attitudes to the permitted extent of defence safeguards are evident. Each jurisdiction ensures that defence rights are tailored to prevent interference with prosecution and conviction. Consequently, in neither process can defendants be sure of judgement by independent tribunal. The composition and attitudes of the tribunal and the effects of case construction leave the scope of this protection at the discretion of the system. Each process takes steps to limit the effectiveness of the right to be heard, further exacerbating the disclosure problems encountered at the prosecution stage. Attitudes to defence rights disclose that neither system places a high value of procedural propriety. Courts in both jurisdictions have shown themselves prepared to place enforcement needs before due process. Once again, the disparity between the

systems significant sanctioning powers and the restricted defence safeguard is apparent.

The problems and consequences of such an approach have been explored fully in the horizontal context, therefore they need not be examined further here [179]. As already noted, both DGIV and the English criminal process bear considerable resemblance to the crime control model. These crime control features are equally evident in DGIV's treament of distribution cases. Specifically, the Commission uses its sanctioning powers punitively and ensures that neither the defendant nor others involved in the process are able to impede the prosecution momentum by promoting defence rights over enforcement needs. All possible steps are taken to limit the scope and effectiveness of challenges to DGIV's case. Finally, the Court's repeated refusal to annul for procedural breach discloses its crime control belief that the end justifies the means. Successful enforcement is more important than due process. Clearly, at trial stage, the crime control rationale dominates the Commission's thinking suggesting that the problems currently being experienced within the English criminal process may soon become a common feature of EC competition law.

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1 Basketball player Dale Berra referring to his father, Yogi.

2 For background information, see : Whish *Competition Law* Butterworths (1993) at pp 311-312 ; Green *Commercial Agreements and Competition Law : Practice and Procedure in UK and EEC* Graham and Trotman (1986) at pp 304-315 ; Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) Ch6 ; Kerse *EC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) at paras 6.53-6.63 ; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61 ; Van Bael 'Transparency of EC Commission Proceedings' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 192 ; Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards : Is Regulation 17 Falling into Abeyance?' *ELR* [1986] 268 ; Temple Lang 'The Procedure of the Commission in Competition Cases' *CMLR* [1977] 155 ; Bourgeois 'Undertakings in EC Competition Law' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 90.

3 The cases under consideration here are *National Panasonic*, *Viho*, *Dunlop/Slazenger*, *John Deere*, *Fisher Price*, *BL*, *Tippex*, *Sandoz*, *Distillers*, *Ideal* and *Grohe*. Whether these cases indeed received plea-bargains is far from clear. They are being considered here on the basis that they display some or all of the features common to plea-bargained cases ie admission of guilt, co-operation with prosecution, the giving of undertakings and a concomitant reduction in fines. From a reading of the cases, a definite bargains seems to have occurred in *Viho* (Commission decision) at pp 185-187, *National Panasonic* (Commission decision) at p 508 and *Dunlop/Slazenger* at pp 366, 372. In *John Deere* at p 563, *BL* at p 100 and *Fisher Price* at p 559, the status of these cases as plea-bargains is unclear, though there is some evidence of a possible bargain. In each instance, their co-operative attitude was noted, conduct was terminated and fines were reduced accordingly, seeming to indicate some form of bargain. In addition, both *Fisher Price* and *John Deere* instituted compliance ptrogrammes. However, Van Bael in 'The Antitrust Settlement Procedure of the EC Commission' *CMLR* [1986] 61 at pp 66-67, treats *BL* and *John Deere* as formally prosecuted. But, for the reasons outlined above, this study will treat them as possible plea-bargains. The situation is even less clear in *Tippex* (Commission decision) at p 442, *Sandoz* (Commission decision) at p 635, 637, *Distillers* at p 2277, *Ideal* at p 639, and *Grohe* at p 615. Here some features such as co-operation and mitigation of fines seems to have occurred, but the lack of clarity in DGIV's sanctioning assessments means that it is difficult to determine where to draw the line between a bargained case and simple mitigation of a fine. In order to cover both possibilities, some limited consideration of these cases as possible bargains will be given here.

4 See Appendix B, Table 2, Cases 17-23, ie :

1) Murat [1984] 1 CMLR 219 (hereafter referred to as *Murat*) ;
2)IBM [1984] 2 CMLR 342 (hereafter referred to as *IBM*) ;
3)Villeroy Boch [1988] 4 CMLR 461 (hereafter referred to as *Villeroy Boch*) ;
4)Kenwood Electronics [1993] 4 CMLR 389 (hereafter referred to as *Kenwood*) ;
5)Schott Zwiesel Glaswerke [1993] 5 CMLR 85 (hereafter referred to as *SZG*) ;
6)Alfa Romeo 14th Report on Competition Policy 1984 at p 70 (hereafter referred to as *Alfa)* ;
7)Fiat 14th Report on Competition Policy 1984 at p 71 (hereafter referred to as *Fiat).*

These cases have been selected in the absence of sufficient concrete information on the Commission's settlement of comfort letters as they provide an excellent demonstration of DGIV's negotiation and modification of vertical cases. All cases except *Kenwood* and *SZG* have been negatively cleared. These two remaining cases await full clearance. In both cases, the Commission notice has indicated that it intends to take a favourable view. Of course, many exclusive distribution agreements receive exemption under Reg.1983/83. It is not proposed to deal with these as again non-publication of such exemptions makes it impossible to discuss the detail of individual cases. For further discussion of the general approach to exclusive distribution block exemption, see Whish *Competition Law* at pp 566-574 ; Korah and Rothnie *Exclusive Distribution and the EEC Competition Rules* Sweet and Maxwell (1992).

5 See Ch7 supra for the discussion of the classification and analysis of distribution cases.

6 *Viho* (Commission decision) at pp 180, 187 and also *Dunlop/Slazenger* at p 373. Both cases were regarded as serious infringements because they undermined Single Market integration. In both instances however, the firms admitted the violation. *Dunlop/Slazenger* gave undertakings as to future conduct, whilst *Viho* instituted a compliance programme. *Viho* (Commission decision) at p 187, was praised for its "very constructive attitude". See also *Tippex* (Commission decision) at p 442 and *Fisher Price* at p 559.

7 See for instance, *Villeroy Boch* at p 469, *IBM* at p 345, *Kenwood* at p 391 and *SZG* at p 85.

8 See discussion of the ambit of Art.85(1) in relation to selective distribution systems in Ch7 supra.

9 See *SZG* at p 86, *Kenwood* at p 391, *Alfa* at p 70, *IBM* at pp 345-347, *Fiat* at p 71 and *Murat* at p 222.

10 See *SZG* at p 86, *Kenwood* at p 319, *Murat* at p 223 and *Villeroy Boch* at p 470.

11 See *IBM* at pp 345-347, *SZG* at p 86 and *Kenwood* at p 391, *IBM* at pp 345-347 and *Villeroy Boch* at pp 465-496 respectively.

12 See *Villeroy Boch* and *Murat*.

13 *Villeroy Boch* at p 469. A similar approach was taken in *Murat* at p 223, regarding a minimum stocking requirement. Other offending clauses in these agreements were negotiated and modified.

14 See *SZG* at p 86, *Kenwood* at p 391, *Murat* at p 222, *IBM* at pp 345-347, *Villeroy Boch* at pp 465-496, *Alfa* at p 65 and *Fiat* at p 65.

15 See the discussion of negotiated settlements in horizontal cases in Ch5 supra for further details of these influencing factors. This section will principally compare and contrast DGIV's approach between plea-bargained and negatively cleared cases, though where appropriate, other formally prosecuted cases will be referred to.

16 *Fiat, Alfa, SZG, Kenwood, Villeroy Boch, IBM* and *Murat* all underwent modifcation. In *Viho* (Commission decision) at p 185, *National Panasonic* (Commission decision) at p 508, *John Deere* at p 563 *Fisher Price* at p 559 and *BL* at p 100, conduct was terminated. In addition, in the borderline cases of *Tippex* (Commission decision) at p 442, *Sandoz* (Commission decision) at p 637, the behaviour was terminated, whilst agreements in *Ideal* and *Grohe* were modified.

17 *Dunlop/Slazenger* at pp 366, 372. Here DSI admitted offence and gave undertakings as to future conduct in mitigation of fines. Of course, if *BL* and *John Deere* are regarded as fully enforced cases, then the converse is also true. Termination will not automatically result in informal settlement.

18 See the negatively cleared cases of *SZG, Kenwood, Alfa, Fiat* and *Murat* ; the bargained cases of *Viho, National Panasonic, Dunlop/Slazenger, John Deere, BL* and *Fisher Price* and the formally prosecuted cases of *Pioneer/MDF, Camera Care/Hasselblad, Ford* and *AEG.* In addition, the borderline cases of *Tippex, Sandoz* and *Distillers* also involved similar restrictions.

19 See Chard 'The Economics of the Application of Art.85 to Selective Distribution Systems' *ELR* [1982] 83 on the Commission's approach to price discrimination etc.

20 The negatively cleared cases were *SZG* and *IBM. Viho, National Panasonic, Dunlop/Slazenger, John Deere, Fisher Price,* and *BL* were bargained/possibly bargained, whilst *AEG, Camera Care/Hasselblad, Ford* and *Pioneer/MDF* were prosecuted. In addition, the marginal cases of *Distillers, Sandoz* and *Tippex* used similar tactics.

21 As noted earlier, these two cases may have been the subjects of some bargaining during the prosecution process. The notified agreement in *Vichy* imposed a similar quantitative restriction and was not only prosecuted but had its immunity against fining lifted.

22 *Kenwood, IBM, Villeroy Boch* and *SZG* imposed excessive restrictions and DGIV considered the systems open to abuse and discrimination. These cases were negotiated and modified. In contrast, customer restrictions exceeding objective necessity in *Ideal* and *Grohe* were formally prosecuted and modification obtained. Whilst the discriminatory application of existing distribution systems in *Vichy, Ford* and *AEG* were prosecuted in full.

23 See Harding *EC Investigations and Sanctions* at p 100.

24 *Murat, IBM, Villeroy Boch, Kenwood, SZG, Alfa* and *Fiat* were negatively cleared. Cf the formally prosecuted cases of *Grohe, Ideal, Distillers, Vichy, Ford, AEG* and *Camera Care.* In *Grohe, Ideal* and *Distillers,* a tacit bargain may have occurred. In *Distillers,* the Commission delayed enforcing a decision against Distillers until the undertaking had established itself on the market as a means of resolving a conflict between economic needs and integration needs. See discussion by Whish *Competition Law* at pp 565-566.

25 See *Alfa* at p 66, *Fiat* at p 65, *Murat* at pp 222-223, *IBM* at pp 345, 347, *Kenwood* at p 391, *SZG* at p 85, *Villeroy Boch* at p 465,467.

26 *Viho* (Commission decision) at p 187 and *National Panasonic* (Commission decision) at p 508, were praised for their "very constructive attitude". The co-operation of *Dunlop/Slazenger, John Deere* and *Fisher Price* was also noted. All these firms either instituted compliance programmes, modified the agreement or gave undertakings as to future conduct.

27 See *BL* at p 100. Also the marginal cases of *Tippex* (Commission decision) at p 442, *Sandoz* (Commission decision) at pp 635, 637, *Ideal* at p 639 and *Grohe* at p 615. In the latter two cases, no fine was imposed. In *Sandoz,* the firms co-operation only earned a reduction in fines on appeal to the Court. In *Distillers,* the agreement was modified. Here DGIV delayed

enforcing the decision against Distillers until the undertaking had established itself on the market.

28 *Ford* (Commission decision) at p 604.

29 Information on this section is derived from : Green *Commercial Agreements and Competition Law* at pp 304-315 ; Harding *EC Investigations and Sanctions* Ch6 ; Whish *Competition Law* at pp 311-312 ; Kerse *EC Antitrust Procedure* at paras 6.53-6.63 ; Bourgeois 'Undertakings in EC Competition Law' ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 17-19 ; Written Submissions by Reynolds, JWP, Ehlerman, Lever and Forwood to the Select Committee, Minutes of Evidence Reynolds at p 9 ; p 62 ; pp 112, 121, 142, 147 ; p 61 and p 208 respectively. See also, Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards'; Van Bael 'The Antitrust Settlement Procedure of the EC Commission' ; Van Bael 'Transparency of EC Commission Proceedings' ; D.Stevens 'The Comfort Letter : Old Problems, New Developments' *ECLR* [1994] 81 ; Korah 'Comfort Letters - Reflections on the Perfume Cases' *ELR* [1981] 14 ; Korah 'Selective Distribution' *ECLR* [1994] 10 ; Gyselen 'Publication Policy of the Commission with Regard to Comfort Letters' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 217.

30 Although no comfort letters are included in the study, it is appropriate to consider their legal value as they form an important element of the Commission's enforcement policy, particularly in vertical cases.

31 This much has long been acknowledged by the Commission. See 5th Report on Competition Policy 1975 at p 9.

32 *Perfumes* [1980] ECR 2327. Previous examination in *Frubo v Commission* [1975] ECR 563, held that comfort letters did not bind the Commission. Also see, *De Bloos v Bouyer* [1977] ECR 2359. Although the Court here were not required to rule on the matter, AG Mayras at p 2376, considered that comfort letters were not "acts" within the meaning of Art.173 of the Treaty.

33 Three main issues required clarification : i)the legal nature of comfort letters ; ii)whether a national court was bound by a comfort letter, and ; iii)the effect of comfort letters on provisional validity.

34 *Perfumes* [1980] ECR 2327 at paras 11-18, though the ECJ considered that national courts should take the Commission's views into account. Lord McKenzie Stuart 'Legitimate Expectation and Estoppel' *LIEI* [1983] 53, argues that it would be difficult for the Commission to re-open the file in the absence of evidence suggesting a fundamental change in circumstances. However, it was held that comfort letters do affect provisional validity. The implications of this will not be addressed here as it does not affect any of the cases in the study. For a thorough critique, see Korah 'Comfort Letters' ; Kerse *EC Antitrust Procedure* Ch10 and Kon 'Article 85 Paragraph 3 : A Case for Application by National Courts' *CMLR* [1982] 541.

35 See Kerse *EC Antitrust Procedure* at para 6.56, who points out that what is important is the legal effect on the addressee. See also criticism by D.Stevens 'The Comfort Letter' and Korah 'Comfort Letters'. Stevens at p 83, suggests that the ECJ evaded the issue because giving comfort letters "decision" status would have raised several problems relating to the question of delegation and its reviewability under Art.173 of the Treaty. Most importantly, it would have given comfort letters a legality never intended by the Commission.

36 D.Stevens 'The Comfort Letter' at p 83. Art.189 of the Treaty provides that regulations, directives and decision may form the basis of an Art.173 Treaty of Rome 1957 action.

37 Cf the comments of AG Mayras in *De Bloos v Bouyer* [1977] ECR 2359 and the decision in *Re ERTA : EC Commision v EC Council* [1971] CMLR 335, which established that "acts" could extend beyond regulations and decisions and that judicial review should be available against all measures taken by Community institutions. Comfort letters would be regarded as "measures" here. Also, *IBM v Commission* [1981] 3 CMLR 635 which advocated a liberal interpretation of "act" under Art.173 of the Treaty focusing on substance rather than format. See discussion by D.Stevens 'The Comfort Letter' at pp 82-84.

38 The aim here was to enhance the legal value of these comfort letters by publishing the essential contents of agreements in appropriate cases so allowing third parties to comment. See 12th Report on Competition Policy 1982 at pt 30 ; 13th Report on Competition Policy 1983 at p

72 ; *Practice Note* OJ [1982] C343/4. Discussed by Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards'.

39 In 1990 only three were issued ; in 1991, five were issued and in 1992, only eight. See 20th, 21st, 22nd Reports on Competition Policy 1990, 1991, 1992 at p 73 ; p 60 and p 62 respectively. See also, Appendix B, Table 8 for further statistical details of DGIV's use of comfort letters.

40 Under Art. 2. Under Art.19(3), the Commission must publish its intention to grant negative clearance in order to give interested parties opportunity to comment. An application for negative clearance alone does not provide immunity from fines under Art.15(5). In practice, this is not a problem as most notifications apply for both negative clearance and/or individual exemption. Nor does negative clearance give immunity from the stricter application of domestic law. For further discussion, see Kerse *EC Antitrust Procedure* at paras 2.02-2.06 and Whish *Competition Law* at p 302.

41 Discussed by Kerse *EC Antitrust Procedure* at para 2.06 ; Notice on Co-operation between National Courts and the Commission in applying Arts.85 and 86 of the EEC Treaty OJ [1993] C39/6 at paras 13, 14.

42 Art.19/Reg 17 and Art.173 of the Treaty.

43 Van Bael 'The Antitrust Settlement Procedure of the EC Commission' ; Van Bael 'Transparency of EC Commission Proceedings'.

44 This is an unsurprising result in the negatively cleared cases. Firms involved are most unlikely to challenge a Commission decision declaring that their agreement falls outside Art.85(1) or the means by which DGIV arrives at such a decision, as such an action would risk formal prosecution. In these cases, challenge by a third party is considerably more likely.

45 Van Bael in 'Transparency of EC Commission Proceedings' and Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 9, have both insisted that considerable scope still remains for improving the legal status of informal resolutions particularly comfort letters. Written Submissions by JWP and Forwood to the Select Committee, Minutes of Evidence at p 62 and p 208 respectively, have asserted that comfort letters are at best only a partial remedy and may prove a false comfort.

46 See D.Stevens 'The Comfort Letter' at p 81.

47 See Written Submission by Ehlerman to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 112.

48 Both firms operated selective distributions systems in consumer electrical goods, and in each, the selection criteria came under question.

49 As well as including restrictive selection criteria which DGIV considered to be open to abuse, the agreement originally imposed a ban on parallel imports and a minimum turnover requirement. The case of *Kenwood* does not stand alone. See also *SZG* which, on notification, contained a ban on parallel sales, rpm, minimum turnover, stocking and promotion requirements

50 For background information see Korah 'Selective Distribution' ; Goebel 'Metro II's Confirmation of the Selective Distribution Rules : Is This the End of the Road ?' *CMLR* 1987] 605 ; Whish *Competition Law* at p 227 ; Kerse *EC Antitrust Procedure* at paras 6.27-6.40 ; Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion in EC Competition Law - Part II' *ECLR* [1989] 256 ; A.Evans 'EC Competition Law and Consumers : The Article 85(3) Exemption' *ECLR* [1987] 425 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 19-21 ; European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997).

51 See Appendix B, Table 2, Cases 24-30 for the cases under consideration ie :

1) Parfums Givenchy [1993] 5 CMLR 579 (hereafter referred to as *Parfums Givenchy*). On appeal as Case T87/92 *Kruidvat v Commission* ;

2)Yves St Laurent [1993] 4 CMLR 120 (hereafter referred to as *Yves St Laurent*). On appeal as Case T19/92 *Societe GALEC v Commission* and Case T99/22 *Groupement d'Achat Edouard Lecler v Commission* ;

3)*Grundig* [1998] 4 CMLR 865, renewed as *Grundig* [1995] 4 CMLR 658 (both hereafter referred to as *Grundig*) ;
4)*Ivoclar* [1988] 4 CMLR 781 (hereafter referred to as *Ivoclar*) ;
5)*Agence et Messageries de la Presse* [1985] 3 CMLR 800, [1987] 3 CMLR 445 (both hereafter referred to as *AMP*) ;
6)*Whisky and Gin* [1986] 2 CMLR 664 (hereafter referred to as *Whisky and Gin*) ;
7)*Saba No 2* [1984] 1 CMLR 676 (hereafter referred to as *Saba II*). See also *Metro II* [1986] ECR 3021.
Of these, *Parfums Givenchy*, *Yves St Laurent*, *Ivoclar*, *Grundig* and *AMP* are selective distribution agreements receiving full Art.85(3) exemption. In AMP, a final decision has not yet been taken, though DGIV has indicated that it intends to take a favourable view of the agreement. On this, see AMP [1987] 3 CMLR 445. *Whisky and Gin*, an exclusive distribution case, received partial exemption under Block Exemption 1983/83 and partial individual exemption. Whilst *Saba II* received partial negative clearance and partial Art.85(3) exemption.

52 See *Yves St Laurent* at pp 126-127, *Parfums Givenchy* at pp 579-580, *Grundig* at pp 873-874, *Ivoclar* at pp 781-782, *Whisky and Gin* at p 664, *AMP* [1987] 3 CMLR 445 at pp 447-448 and *Saba II* at p 685. *Whisky and Gin*, *AMP* and *Ivoclar* did not impose strict monitoring requirements.

53 *Yves St Laurent* at pp 126-127, *Parfums Givenchy* at p 593, *Whisky and Gin* at p 664 and *Ivoclar* at p 785. *Yves St Laurent and Parfums Givenchy* initially imposed a one year export ban on products not yet launched in the dealer's own territory. This was subsequently modified to a ban on active sales. In *Ivoclar*, sales in other territories were limited but not prohibited entirely.

54 *Yves St Laurent* at p 129, *Parfums Givenchy* at p 558, *Grundig* at p 871 and *Saba II* at p 682. For further on this, see complaint in *Saba II* by *Metro II* [[1986] ECR 3021 and discussion by Goebel 'Metro II's Confirmation of the Selective Distribution Rules'.

55 *Yves St Laurent* at pp 137-140, *Parfums Givenchy* at pp 595-597, *Grundig* at pp 874-876, *Ivoclar* at pp 786-788, *Whisky and Gin* at pp 671-673, *Saba II* at pp 689-691. In *Parfums Givenchy* and *Yves St Laurent*, DGIV justified the initial one year ban arguing that it was necessary to permit the manufacturer to test the market. Reporting conditions were imposed in all but *Whisky and Gin* and *Ivoclar*.

56 See study cases of *SZG*, *Kenwood*, *Alfa*, *Fiat*, *Murat* and *IBM*. Here, only *IBM* openly imposed monitoring requirements.

57 See particularly, *Camera Care* and *Dunlop/Slazenger* which were treated as having an anti-competitive object.

58 *Grundig* at p 873.

59 *AMP* [1985] 3 CMLR 800. Discussed by Hendry 'The Not So Special Case of Newspapers and Periodicals' *ELR* [1986] 155. The Court argued that if price-fixing was the only means of bearing the economic burden arising from the return of unsold copies, and if the return of unsold copies was the only means of providing consumers with a wide choice of newspapers, then DGIV should take these factors into account when considering exemption.

60 Rpm was allowed with regard to Belgian newspapers, though DGIV insisted that retailers be allowed to sell foreign newspapers at a lower price. See *AMP* [1987] 3 CMLR 445 at p 448. Discussed by Hendry 'The Not So Special Case of Newspapers and Periodicals' ; Goebel 'Metro II's Confirmation of the Selective Distribution Rules'.

61 Though, as already seen, they received very different treatment. The export bans in *Viho*, *Tippex*, *National Panasonic*, *Dunlop/Slazenger*, *John Deere*, *Fisher Price*, *Sandoz*, *BL* and *Distillers* were formally prosecuted. The negatively cleared cases of *SZG* and *IBM* were negotiated and modified.

62 *Grundig* at p 874 and *Saba II* at p 685. In *Villeroy Boch*, similar restrictions were held to fall outside Art.85(1) as merely relating to the different functions of separate distribution channels. *Yves St Laurent* at p 130, imposed restrictions on mail order sales which DGIV also held to be outside Art.85(1).

63 *Ivoclar* at pp 781, 785, *Ideal* at p 630 and *Grohe* at p 615.

64 *Ivoclar* at pp 785-788, *Ideal* at pp 635-637 and *Grohe* at pp 615-617. *Ideal* at pp 630-631, insisted that, as the products were semi-finished, the restriction protected the consumer from risk by ensuring that fitting was conducted by cmpetent professionals, thereby maintaining high standards.

65 See complaints in *Parfums Givenchy*, *Yves St Laurent*, *Saba II* and *Grundig*.

66 *Yves St Laurent* at pp 125-129, 133 and *Parfums Givenchy* at pp 580-581, 588-589, 591. Both cases had reporting requirements imposed. In both instances, third parties appeals by excluded dealers have been launched in *Yves St Laurent* by *Groupement d'Achat Edouard Lecler v Commission* and *Societe GALEC v Commission*, and in *Parfums Givenchy*, by *Kruidvat v Commission*.

67 See *SABA II* at pp 686-689, *Metro II* [1986] ECR 3021 at pp 3090-3093. In *Grundig* at p 871, similar arguments were advanced. Discussed by Goebel 'Metro II's Confirmation of the Selective Distribution Rules' and Pathak 'Art.85 and Art.86 and Anti-Competitive Exclusion'.

68 *Saba II* at p 688. A number of third parties disagreed arguing that this would serve to undermine the integrity of the system See also, *Villeroy Boch* at p 468. In addition, in other negatively cleared cases, admission criteria were considered open to abuse and were negotiated and modified, eg *IBM* and *Kenwood*.

69 Metro II [1986] ECR 3021 at pp 3083-3085, 3090-3093. Metro argued that all discount stores like itself were effectively excluded from all the distribution systems on the market. The Commission at p 3091, disagreed. Metro was particularly critical of DGIV's approach to economic analysis, specifically its reliance on limited, incomplete and outdated information. AG van Themat at p 3048, was equally critical, specifically of DGIV's failure to undertake a proper market study. In *Grundig* at p 877, DGIV also held that the concentration of systems had not led to price rigidity or discrimination against other types of outlet.

70 *AEG* at pp 3197-3198. In neither *AEG* nor *Metro II*, did the Commission or Court indicate how many refusals constitute a systematic abuse.

71 *Yves St Laurent* at p 136, *Parfums Givenchy* at pp 594-595, *Saba II* at pp 690-691 and *Grundig* at p 875. These advantages were seen to benefit the consumer.

72 *Grundig* at pp 873-874, 876 and *Villeroy Boch* at p 470.

73 *Yves St Laurent* at p 125 and *Parfums Givenchy* at p 579. Discussed in Korah 'Selective Distribution'. Also *Grundig*, *Ivoclar* and *Saba II* imposed requirements as to stocking and promotion. In addition, AMP's selection criteria are based on annual minimum turnover. See *AMP* [1987] 3 CMLR 445 at p 445.

74 *Yves St Laurent* at p 129, *Parfums Givenchy* at p 588 and *Saba II* at p 682-683.

75 *Yves St Laurent* at p 133, *Parfums Givenchy* at p 593, *Saba II* at p 685. See also *Grundig*, *AMP* and *Ivoclar* who admitted that such requirements restricted dealers' commercial freedom.

76 Typically, DGIV found that the requirements would ensure a wide range of products were available, would assist in sales planning, would allow maximum exploitation of the market and would serve to enhance the brand image. See *Grundig* at pp 875-888, *Ivoclar* at p 786, *Parfums Givenchy* at pp 594-99, *Yves St Laurent* at pp 135-140, *AMP* [1987] 3 CMLR 445 at p 445 and *Saba II* at pp 688-690.

77 *Villeroy Boch* at pp 468-469. See also *SZG* and *Kenwood* who imposed stocking and promotional requirements and *Murat* where purchasing and promotional obligations were required Initially, *Kenwood* incorporated a minimum turnover requirement. This was modified at the Commission's request to an annual sales plan requirement. In these cases, promotional requirements were seen as merely assisting in maintaining the brand image. But, in *Ideal* at p 633 and *Grohe* at p 615, DGIV doubted the compatability with Art.85(1) of stocking and promotional requirements.

78 *Grundig* at p 871, *Metro II* [1986] ECR 3021 at pp 3086-3088. In *Grundig*, it was also doubted whether dealers in reality provided any advice or after-sales service.

79 See *IBM* at p 342, *Ivoclar* at pp 786-788 and *Ideal* at p 627.

80 Art.6, Art.19(3)/Reg 17 and Art.173 of the Treaty.

81 Van Bael 'The Antitrust Settlement Procedure of the EC Commission' ; Van Bael 'Transparency of EC Commission Proceedings'. See also discussion of informal resolutions earlier in this chapter.

82 In *Yves St Laurent* and *Parfums Givenchy*, the undertakings were required to report to the Commission every two years, giving details of such matters as the size of the network, product range and minimum annual purchasing obligations imposed on dealers. In *Yves St Laurent*, a six year exemption was granted, whilst in *Parfums Givenchy*, the exemption was for five years. In *SABA II* and *Grundig*, annual reporting conditions required details relating to all refusals of admission into the network, terminations of dealerships and inspections of dealers records. Here, exemptions were granted for eight years and twelve years respectively. In *Grundig* OJ [1995] 4 CMLR 658, DGIV extended the exemption for a further ten years subject to the same conditions.

83 See Commission notice - *AMP* [1987] 3 CMLR 445 at p 448. The final decision in this case is awaited. In contrast, in *Ivoclar*, where customer restrictions were also imposed, and in *Whisky and Gin*, exemptions of 10 years were granted with no conditions imposed. In *Ivoclar*, DGIV's Art.19(3) notice declared its intention to extend this exemption. See *Ivoclar (No2)* [1994] 4 CMLR 578.

84 See particularly, *Whisky and Gin*, *Ivoclar* and *Grundig*. This situation is heavily criticised by Goebel in 'Metro II's Confirmation of the Selective Distribution Rules' and Chard in 'Selective Distribution Systems'. The Commission would disagree. In its recent Green Paper, one of the perceived advantages of the present system was its ability to provide for a thorough economic assessment under Art.85(3). See European Commission *Green Paper on Vertical Restraints in EC Competition Policy* COM (96) 721 (1997) at p vii, Ch5.

85 See discussion of qualitative/quantiative criteria in the formal prosecution of vertical cases in Ch7 supra.

86 Chard 'Selective Distribution Systems' at pp 95-97 particularly. Goebel 'Metro II's Confirmation of the Selective Distribution Rules' at p 619, also questions DGIV's justification for permitting quantitative criteria in some cases whilst not in others, particularly as all distribution systems face the same marketing problems.

87 Goebel 'Metro II's Confirmation of the Selective Distribution Rules' at pp 622, 634. He argues that the Court have chosen to deal with substantive legal issues as fact-finding matters in order to support Commission decisions.

88 Goebel 'Metro II's Confirmation of the Selective Distribution Rules' at pp 629-630. He also criticises DGIV's assumption that what benefits producers, benefits consumers, and the Court's willingness to uphold DGIV's inadequate market analysis and intuitive conclusions. A.Evans 'EC Competition Law and Consumers', also asserts that the Commission has been careless of consumer interests.

89 Goebel 'Metro II's Confirmation of the Selective Distribution Rules' at pp 626-627, who asserts that the reason for this reluctance is that, on finding market rigidity, it raises the problems of whether DGIV would be obliged to revoke existing exemptions or merely refuse the latest application for exemption. He argues that the only fair, though bizarre, answer would be to revoke all exemptions and moreover inform 'simple' selective distribution systems that they now infringe Art.85(1).

90 *AEG* is discussed by Goebel 'Metro II's Confirmation of the Selective Distribution Rules' at pp 616-618.

91 See Ch5 supra.

92 See *Tippex* (Commission decision) at p 441, *John Deere* at p 564, *Ford* (Commission decision) at p 607, *Sandoz* (Commission decision) at p 637, *Camera Care* at p 259 and *Pioneer* at p 487, where 'cease and desist'/'like effect' orders were made. In *Distillers* (Commission decision) at p 440, *Dunlop/Slazenger* at p 372, *BL* at p 100, *AEG* at p 3158, *Fisher Price* at p 559, *National Panasonic* (Commission decision) at p 507, *Ideal* at p 639, *Grohe* at p 625, *Viho* (Commission decision) at p 186 'cease and desist' orders alone were issued. The decision in *Vichy* is provisional and relates to fining immunity ; the final decision is awaited. See Appendix B, Table 7 for further details of the Commission's sanctioning decisions in the case study.

93 See *Fisher Price*, *Viho*, *Ideal*, *Grohe*, *National Panasonic*. In addition, the final decision in *Vichy* may impose further conditions.

94 See *Camera Care*, *Dunlop/Slazenger* and *BL*.

95 *Camera Care* at pp 259-261. In *Dunlop/Slazenger*, the Commission specifically ordered the termination of the export ban and pricing measures. In *BL*, the undertaking was required to inform DGIV of the measures it had taken to secure termination of the violation.

96 In *Distillers*, *Ford*, *Vichy*, *Ideal* and *Grohe* as no fines were imposed, they will not be considered in the following evaluation.

97 See *Viho* (Commission decision) at p 186. In eight of the eleven formally prosecuted cases receiving fines, DGIV found intent : *Tippex*, *Fisher Price*, *John Deere*, *National Panasonic*, *BL*, *AEG*, *MDF* and *Camera Care*. In *Camera Care* at p 256, the Commission held that the infringement had been committed "willingly and intentionally". In *Sandoz* (Commission decision) at p 637, DGIV held that the offence was probably intentional or at least "gravely negligent". In *Dunlop/Slazenger* at p 372, the formula was either "intentional or negligent".

98 Eg in *Dunlop/Slazenger* at p 372, "could not have been unaware" and *National Panasonic* (Commission decision) at p 507, "should have been aware" that the conduct was a serious infringement of the Treaty. See also similar comments in *Tippex*, *John Deere*, *Camera Care*, *Sandoz*, *BL*, *MDF*, *AEG*, *Viho* and *Fisher Price*.

99 See *John Deere* at p 563, *Tippex* (Commission decision) at p 442, *Camera Care* at p 256, *Sandoz* (Commission decision) at p 637, *Viho* (Commission decision) at p 186, *Dunlop/Slazenger* at p 372, *Fisher Price* at p 559, *National Panasonic* (Commission decision) at p 507, *MDF* at p 1903, *BL* at p 100 and *AEG* at p 3158. *AEG* appealed unsuccessfully against DGIV's finding of the systematic nature of its conduct. In *John Deere*, the fact that the firm had received legal advice indicating the illegal nature of the conduct was used as evidence of intent.

100 *MDF* at pp 1902-1903.

101 On this, see Kerse *EC Antitrust Procedure* at paras 7.19-7.23 ; Harding *EC Investigations and Sanctions* at pp 86-87 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO ; Reynolds 'EC Commission Policy on Fines' *ECLR* [1992] 263.

102 All formally prosecuted cases receiving a fine were treated this way. Issues relating to the gravity of the violation wers discussed in *Dunlop/Slazenger* at pp 372-374, *National Panasonic* (Commission decision) at pp 506-507, *Camera Care* at pp 256-259, *Tippex* (Commission decision) at pp 441-442, *Sandoz* (Commission decision) at p 638, *Viho* (Commission decision) at pp 186-187, *Fisher Price* at pp 558-559, *John Deere* at pp 563-634, *BL* at p 100, *MDF* at pp 1902-1905 and *AEG* at pp 3158-3159.

103 See *Tippex*, *Camera Care*, *Sandoz*, *MDF*, *National Panasonic*, *Viho*, *Dunlop/Slazenger*, *Fisher Price* and *AEG*. Indeed, in several cases, the producer bore the sole responsibility - *Sandoz*, *Fisher Price*, *National Panasonic*, *BL*, *AEG* and *Viho*.

104 Eg AWS in *Dunlop/Slazenger* ; Ilford, Telos and Prolux in *Camera Care* ; Beirsdorf in *Tippex*.

105 Eg Toyco in *Fisher Price*, Pinguin in *Dunlop/Slazenger*, Noric and Polack in *Camera Care* and dealers involved in *John Deere* and *Tippex* cases.

106 This appeared to be the attitude taken by DGIV in *Dunlop/Slazenger*, *Camera Care* and *Tippex*, where large fines were imposed on producers, smaller fines were levied against distributors who had played a subsiduary but active role under coercion, but no fines on other dealers who had acceeded to pressure.

107 *Fisher Price* at pp 558-559 and *Dunlop/Slazenger* at pp 372-374. On appeal in *AWS*, the CFI annulled DGIV's decision in *Dunlop/Slazenger* insofar as it related to AWS because of irregularities relating to Art.190.

108 *Dunlop/Slazenger* at pp 372-374. As a result, DSI's fine was substantially larger than fines imposed on other firms for similar offences, eg Viho, who chose to co-operate with DGIV. DSI did subsequently gave undertakings as to future behaviour. See also *Sandoz* (Commission

decision) at p 638, who had several opportunities to remove the words "export ban" from invoices and failed to do so. This was viewed as aggravating conduct.

109 Ie *John Deere*, *Tippex*, *Camera Care*, *Sandoz*, *Viho*, *Dunlop/Slazenger*, *Fisher Price*, *National Panasonic*, *BL*, *AEG* and *MDF*. In *Camera Care* at p 256, DGIV noted that Hasselblad and HGB had acted with "particular zeal".

110 *Viho* (Commission decision) at p 187, *Sandoz* (Commission decision) at p 638 and *Dunlop/Slazenger* at 374. Elsewhere, long duration has been viewed as an aggravating factor, eg *John Deere* at p 564, *Camera Care* at p 256, *MDF* at p 1902, *AEG* at p 3158, *BL* at p 100 and *Fisher Price* at pp 558-559.

111 *MDF* at pp 1902-1905. As noted in an earlier chapter, the ECJ went on to outline the relevant factors the Commission should take into account. This is discussed in detail in relation to the gravity of horizontal offences in Ch6 supra. *AEG* at p 3220, also complained that the fine was excessive given the isolated nature of the infringing conduct.

112 Kerse *EC Antitrust Procedure* at paras 7.18, 7.21 and 7.24.

113 *Camera Care* at p 256. A similar attitude was seen in *Tippex* (Commission decision) at p 442, *John Deere* at p 564, *Sandoz* (Commission decision) at p 638, *MDF* at pp 1904-1905, *Viho* (Commission decision) at p 187, *Dunlop/Slazenger* at p 374, *Fisher Price* at p 559, *National Panasonic* (Commission decision) at p 507, *BL* at p 100 and *AEG* at p 3159.

114 Compare particularly, *Viho* and *Dunlop/Slazenger* who were both accused of the same violation, but *Dunlop/Slazenger* was fined twice as much as *Viho*. These anomalies are discussed and criticised by Reynolds in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 39-40.

115 Though this is normally an aggravating factor. In *Sandoz* (Commission decision) at p 629, the firm was described as a multi-national company of major importance on all continents. *Tippex* (Commission decision) at p 428, was described as a medium-sized firm with a strong, but not dominant, position on the market. Similar comments were made in *Camera Care*, *John Deere*, *AEG*, *BL*, *MDF*, *National Panasonic*, *Fisher Price*, *Dunlop/Slazenger* and *Viho*.

116 *Camera Care* at p 234.

117 Eg *Tippex* (Commission decision) at p 442, *Viho* (Commission decision) at p 187 and *John Deere* at p 564.

118 *Camera Care* at p 257. Though elsewhere, it did state that market partitioning was inherently detrimental to price and therefore to consumers. See also comments above relating to the importance of the product. In *Fisher Price* at p 559, DGIV noted that the effects of the conduct had been progressively reduced but did not state what the effects were.

119 See also *Camera Care* at p 234, discussed above. As export bans seek to maintain price differentials between MS, the same harmful effect would result from all conduct under consideration.

120 *Viho* and *Fisher Price* are typical examples of the Commission's bland approach.

121 *John Deere* at p 563.

122 *Sandoz* (Commission decision) at p 638. Also in *MDF*, it was argued that the Commission's authorisation under Art.115 Treaty for France excluding Japanese hi-fi products from Community treatment justified the annullment of the fine. The ECJ, at paras 99-100, rejected the submission.

123 Eg *Tippex* (Commission decision) at p 442, where it was held that such infringements "substantially impede the integration of the markets of the Community". Other cases like *Dunlop/Slazenger* at p 373, refer to such violations as undermining "one of the fundamental objectives of the Treaty".

124 Kerse *EC Antitrust Procedure* at para 7.25.

[125] Both fines were reduced on appeal. *Sandoz's* fine was reduced to 500,000 ECU and MDF's to 3.2m ECU. A similar anomaly exists between *Viho* who received a 2m ECU fine for a 14 year violation and *Dunlop/Slazenger* who were fined 5.150,000m ECU for a seven year offence. It appears that the only difference here is that *Dunlop/Slazenger* contested the Commission's finding, whilst *Viho* co-operated and instituted a compliance programme. See Appendix B, Table 7 for details of the duration of violations and sanctions imposed in the study.

[126] In *AEG*, an offence of 3½ years received a 1m ECU fine whilst in *MDF*, an offence of 2m - 3 years received a 6,950,000m ECU fine, reduced to 3.2m ECU on appeal. Other dissimilarities exist. In *Camera Care*, a six year violation received a 755,000 ECU fine reduced to 670,000 ECU on appeal. Whilst in *John Deere*, a seven year offence received a 2m ECU sanction.

[127] Eg *Viho* (1992) a 2m ECU fine, *Dunlop/Slazenger* (1993) a 5.1m ECU fine and *AEG* (1983) a 1m ECU fine. Similarly, large fines were levied in *MDF* (1983) a 6.9m ECU fine, and *John Deere* (1985) a 2m ECU sanction.

[128] This is particularly so in the case of *Sandoz*, though DSI in *Dunlop/Slazenger* did receive the largest fine (5m ECU) imposed here on a single firm and thus is more consistent with DGIV's use of the 'law as a resource' in sanctioning.

[129] *Viho* was a clear plea-bargain. In *Sandoz* and *Dunlop/Slazenger*, the situation is much less clear, but in mitigation, both admitted the offence. *Sandoz* co-operated with DGIV, as did *Dunlop/Slazenger*, though only in the latter stages of the case.

[130] See Kerse *EC Antitrust Procedure* at para 7.34 et seq.

[131] Eg in *Sandoz* and *John Deere*. See earlier discussion in this chapter of the gravity of the offence for further consideration of anti-competitive impact. Also in *Tippex* (Commission decision) at pp 442-443, the fact that Tippex had taken time and money to penetrate the market seemed to be a mitigating factor.

[132] *Fisher Price* at pp 558-559. Similarly in *Dunlop/Slazenger*, whilst the export ban here was general, the fact that, in practice, it only affected a limited range of products was taken into account.

[133] For further, see earlier discussion of the gravity of violations. See particularly DGIV's treatment of parties in *Dunlop/Slazenger*, *Camera Care* and *Tippex*.

[134] Eg the fine imposed on AWS in *Dunlop/Slazenger* was reduced. But, in *Fisher Price*, Toyco received no fine.

[135] See particularly, the approach in *Dunlop/Slazenger*, *Camera Care*, *Tippex*, *Fisher Price* and *John Deere*.

[136] See *Tippex*, *John Deere*, *Sandoz*, *Viho*, *Dunlop/Slazenger*, *Fisher Price*, *National Panasonic*, *BL*. In particular, the constructive attitudes of *Viho* and *National Panasonic* were noted. In *Sandoz*, the firm's co-operation was only rewarded on appeal.

[137] *AEG* at pp 3158-3159 and *John Deere* at pp 563-564.

[138] For a thorough discussion of the background to the Commission's fining policy, see Ch6 supra.

[139] *Camera Care* at p 258. In *MDF* at para 115, the ECJ upheld the need for fines to reflect elements of individual and general deterrence.

[140] See eg *Dunlop/Slazenger* at pp 372-374, *Viho* (Commission decision) at pp 186-187, *Fisher Price* at pp 558-559.

[141] Art.15(2). Discussed by Kerse *EC Antitrust Procedure* at paras 7.26-7.30.

[142] See eg *Dunlop/Slazenger* at pp 372-374, *AEG* at pp 3158-3159, *BL* at p 100, *National Panasonic* (Commission decision) at pp 506-507, *Fisher Price* at pp 558-559, *Viho* (Commission decision) at pp 186-187, *John Deere* at pp 563-564, *Tippex* (Commission decision) at pp 441-442.

143 *Sandoz* (Commission decision) at pp 637-638. DGIV made no reference to the profits accruing from the violation.

144 *Camera Care* at p 258.

145 *MDF* at paras 113-115. Defendants argued that DGIV's approach was particularly unfair as the goods involved comprised only a small part of the total turnover.

146 *MDF*, in particular, at para 121. Here, the ECJ upheld the legality of taking global turnover into account. The Court envisaged a balancing act between total turnover and turnover of goods involved, On this, see Ch6 supra for further discussion of DGIV's assessment of fines in horizontal cartels.

147 The eleven cases were *Tippex*, *Fisher Price*, *National Panasonic*, *BL*, *AEG*, *MDF*, *John Deere*, *Sandoz*, *Viho*, *Dunlop/Slazenger* and *Camera Care*. Decisions alone were made in the remaining five cases. The decision in *Vichy* is an interim one. See Appendix B, Table 7 for full details of the fines imposed.

148 For more detailed consideration of these discrepancies, see the discussion of DGIV's assessment of the duration of offences in vertical cases earlier in this chapter.

149 The Commission's generous attitude to SME's has already been noted.

150 See particularly, *Viho* where TEG was fined 2m ECU and *Dunlop/Slazenger* where DSI was fined 5m ECU. As discussed earlier under the examination of the DGIV's assessment of the duration of offences, the precise effect of DGIV's case construction is unclear because of the lack of information provided by DGIV regarding the fining assessment.

151 See comments in Written Submission by Reynolds to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 7.

152 Reynolds 'EC Commission Policy on Fines' *ECLR* [1992] 263 has been extremely critical of this.

153 See *Hasselblad* at p 594, *AEG* at p 3220 and *MDF* at paras 107-112. In *Hasselblad*, HGB at p 594, complained that its fine was excessive in comparison with the fine imposed on Hasselblad given the difference in respective turnovers. In *MDF* at p 1902, the defendant asserted that DGIV's approach to the assessment of gravity was arbitrary and did not reflect the nature of the violation or to circumstances of the case. *AEG* also complained of the Commission's arbitrariness. Here, AG Reischl at pp 3263-3270, disagreed with the Court, asserting that DGIV had exaggerated the gravity of the violation and had failed to obtain a reliable evaluation of the anti-competitive impact of the offence. In MDF and *Hasselblad*, fines were reduced following partial annullment of the Commission's decision.

154 For background information on this section, see : Dauses 'The Protection of Fundamental Rights in the Community Legal Order' *ELR* [1985] 398 ; Mendelson 'The ECJ and Human Rights *YBEL* [1981] 125 ; Kerse *EC Antitrust Procedure* at para 8.12 ; Van Overbeek 'The Right to Remain Silent in Competition Investigations : The Funke Decision of the ECHR Makes Revision of the ECJ's Caselaw Necessary' *ECLR* [1994] 127.

155 See the discussion of the defendant's right to an independent tribunal in horizontal cartels in Ch6 supra.

156 *MDF* at p 1879 and p 1880 respectively.

157 *MDF* at pp 1879-1880. The Court asserted that MDF had misunderstood the nature of the Commission's procedure. But, the Court acknowledged that DGIV was bound to observe procedural requirements of Community law, ie it must give defendant an opportunity to comment under Art.19(1)/Reg.17 and must base its decision only on objections the defendant has had the opportunity to comment upon. The Court took a similar approach in *Van Landewyck*.

158 *Hasselblad* at pp 565-567. The issue was not dealt with directly by the Court. But AG Slynn at p 567, stated that he was not satisfied that HGB had proved that DGIV was biased as opposed to the Commission having simply rejected HGB's arguments.

159 See the discussion of the defendant's right to an independent tribunal in horizontal cases at Ch6 supra.

160 See Van Overbeek 'The Right to Remain Silent in Competition Investigations'and Kerse *EC Antitrust Procedure* at para 8.12.

161 See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, where a number of parties giving evidence criticised DGIV's disregard for natural justice.

162 Background infomation on this section is derived from ; Kerse *EC Antitrust Procedure* at paras 5.21-5.28 ; Harding *EC Investigations and Sanctions* at pp 48-50 ; Van Bael 'Transparency of EC Commission Proceedings' ; Kuyper and Van Rijn 'Procedural Guarantees and Investigatory Methods in European Law, with Special Reference to Competition' *YBEL* [1982] 1 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO ; Harris 'Problems in Procedure in EEC Competition Cases' *NLJ* [1989] 1452,1457,

163 See discussion of the Advisory Committee in relation to the right to be heard in horizontal cartels, Ch6 supra.

164 See *Distillers* per AG Warner at pp 2292-2294 and the ECJ at pp 2264-2265. The AG noted that the defendants were left in the dark as to what the Commission does/does not tell the Advisory Committee. Moreover, he asserted that not only were defendants not informed of the contents of the report, but also they had no opportunity to address the Committee and this infringed their right to comment. In the event, the ECJ were not required to rule on procedural issues, but they did state that such matters were only relevant if the irregularities could have led to a different result.

165 *MDF*, discussing the scope of Art 10(6)/Reg 17, at pp 1859,1884, and the Court at p 1885. The ECJ's reasoning was that the defendant's right requires that DGIV disclose evidence on which it intends to rely and gives the defendant the opportunity to comment on that evidence. Moreover, the Commission may not base its decision on undisclosed evidence. Under this definition, the Committee's opinion is not relevant to the Commission's decision and thus need not be disclosed. The Court here seemed concerned that disclosure of the report would amount to a re-opening of the procedure.

166 *Distillers* at p 2264. The undisclosed documents included an economic report, supplementary replies by the defence and the minutes of the oral hearing.

167 *Vichy* at pp 425-426, 430. Vichy argued that, given that the decision would result in the imposition of a fine, the Committee should be consulted. In reply, DGIV asserted that it was not normal practice to consult the Committee in such situations and that the urgency of the situation absolved it from the requirement to consult.

168 For additional information, see : Whish *Competition Law* at p 317 ; Kerse *EC Antitrust Procedure* at paras 6.21 and 6.41 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO.

169 See *AEG*, *Vichy*, *MDF*, *Dunlop/Slazenger*, *Hasselblad* and *Ford*.

170 *AEG* at pp 3153, 3192. Here the decision cited two instances of discriminatory practices and relied on letters not disclosed to AEG. In *MDF* at p 1880, DGIV also relied on documents not disclosed to the defence. See also *Vichy* at p 463, where Vichy argued that the decision should be annulled because it contained details of a complaint not mentioned as such in the SO.

171 *Hasselblad* at p 567. This formed part of Hasselblad's argument that the Commission had prejudged the case. *Ford* at p 2744, also alleged that the decision in its case was inadequately reasoned.

172 *MDF* at pp 1880-1882. In *AEG* at p 3192, the Court ruled certain documents and evidence of one case of discriminatory practice inadmissible. Here, the Court asserted that it was not merely the documents but the conclusions that DGIV drew from them that must be disclosed to defendants. In *Vichy* at p 464, the Court made similar comments, though here the Court held that the SO and decision did not differ sufficiently for defence rights to have been breached.

[173] Eg in *MDF*, the Court held that certain letters were sufficiently identified in the SO to be admissible evidence. A similar approach was taken in *AEG* and *Vichy*.

[174] Coppel 'Curbing the Ruling Passion : A New Force for Judicial Review in the European Communities' *ECLR* [1992] 143 ; Doherty 'Playing Poker with the Commission : Rights of Access in Competition Cases' *ECLR* [1994] 8, is particularly critical of the Court's attitude here.

[175] Eg *AEG* at p 3192.

[176] *MDF* at p 1882.

[177] See *Hasselblad* at p 584 and *Ford* at p 2748. In these cases, the Court simply reiterated the broad requirements of Art.190 and stated that the decision was sufficiently reasoned. However,the decision in *Hasselblad* was partially annulled because of DGIV's erroneous legal assessment.

[178] Moreover, the CFI insisted that DGIV could not plead error regarding its failure to name AWS accurately in the decision. The CFI also noted that this was not the first time that DGIV had made such a claim to the Court whilst failing to notify the defendant of an error relating to the operative part of the decision. See *AWS* at pp 43-44.

[179] See Ch6 supra.

CHAPTER NINE

THE 'RULE OF LAW'

"Man has such a prediliction for systems and abstract deductions that he is ready to distort the truth intentionally, he is ready to deny the evidence of his senses in order to justify his logic." [1]

A)INTRODUCTION

This chapter will extend the evaluation of the Commission's conduct by nominally classifying antitrust as 'administrative' and undertaking a 'rule of law' analysis [2]. In an administrative evaluation, one of the main concerns is to examine the extent to which the governing principles control the tribunal's exercise of discretion. Thus, the evidence already amassed will be used to consider whether DGIV's use of its enforcement powers is legally justified by subjecting it to evaluation against the 'rule of law' principles of proportionality, equality, legal certainty, legitimate expectation and good administration [3]. Consequently, the assessment will be able to consider whether the Commission's exercise of discretion promotes or impedes the 'rule of law', so disclosing the extent to which DGIV operates a consistent and fair competition policy and the effectiveness of the 'rule of law' principles as a means of accountability. In this context, the analysis will consider whether DGIV's enforcement approach is 'user-friendly'. Here, the evaluation will extend the work done by Goyder and Wood by assessing DGIV's behaviour in the case study against the qualities suggested by these commentators as being essential [4].

This assessment will argue that the Commission's pursuit of its political and pragmatic goals compromises its exercise of discretion by requiring the 'rule of law' to be subordinated to the achievement of these twin objectives. This disrespect for fundamental legal principles allows the effective enforcement of Reg.17 to prevail over the 'rule of law' producing a competition policy which is not so much dynamic as arbitrary and inconsistent. Admittedly, some flexibility is essential and necessarily means some loss of consistency, but the argument here is that, despite any superficial

discrepancies, DGIV's conduct should adhere to these fundamental principles. Without such compliance, caprice and injustice will become routine, reducing EC competition policy to little more than a visceral reaction to the immediate issues [5]. Finally, should this appraisal disclose problems relating to the political and pragmatic character of competition law, it may be necessary to accept that competition is not a fully justiciable subject.

First, this chapter will consider briefly the Court's ability to review adherence to 'rule of law' principles in competition cases. Then, it will evaluate the Commission's conduct in the context of each principle.

1)The Court's Powers of Review [6]

At the outset, it is clear that these 'rule of law' principles constitute a valid source of Community law. The Court have stated that they fall within Art.164 of the Treaty which requires the Court to "ensure that in the interpretation and application of this Treaty the law is observed" [7]. More specifically, review of competition proceedings takes place under Art.173 of the Treaty where an application for judicial review of acts of the Commission may be made on four specified grounds : lack of competence ; misuse of powers ; infringement of an essential procedural requirement and infringement of the Treaty or any "rule of law" relating to its application [8]. It is under this final ground that failure to comply with a 'rule of law' principle may be reviewed [9].

It is not proposed to undertake a detailed examination of the scope and application of Art.173 as the nature of the 'rule of law' analysis does not require it [10]. At this point, it is sufficient to note the general limitations placed on the Court's review powers under Art.173. As the provision provides for judicial review of the Commission's actions, the Court are unable to substitute their own view for that of the Commission's. Instead, the Court must confine themselves to ensuring that the Commission has not misused its powers or exceeded the boundaries of its discretion. Beyond this, the Court's role is limited to verifying that the facts forming the basis of

the decision are relevant and accurate and that there is no manifest error of evaluation [11]. In particular, the Court recognise that the Commission enjoys a considerable amount of discretion in its decision-making, specifically in relation to the complex economic evaluation required under Art.85 and have shown a marked reluctance to involve themselves in such matters [12]. Where necessary, the effect of these limitations will be examined further in the context of individual principles. It is now intended to assess the Commission's conduct against these 'rule of law' principles. Any problems, criticisms and challenges to the Commission's conduct will be noted

2)The Rule of Law in the Case Study [13]

This section will examine each 'rule of law' principle in turn. With each one, it is intended to outline the basic scope of the principle and then examine the application of that tenet in the context of the case study. In so doing, this examination will focus on whether DGIV's use of its enforcement powers complements or conflicts with the 'rule of law', considering the effectiveness of these principles as a means of accountability [14].

a)Proportionality

The principle of proportionality is one of the most frequently used and well established principles of Community law. It requires that "the measure adopted by Community institutions must not exceed what is appropriate and necessary to attain the objective pursued" [15]. Whilst, this tenet acts as a curb upon DGIV's conduct, the precise extent of the constraint is not entirely clear. Steiner asserts that the principle places the burden on the Commission to justify its actions and requires DGIV to consider possible alternatives. Kerse submits that it is unclear whether the principle of limited intervention should be read into the principle of proportionality in competition cases [16]. If so, this principle would require that where various alternatives were available, each proportional to the objective sought, the least stringent measure must be implemented. Lavoie, however, asserts that the principle of proportionality places little constraint on

DGIV's discretion and does not impose even an obligation on the Commission to act reasonably [17]. This argument has the support of the ECJ who stated that "the legality of a measure can be adversely affected only if the measure is manifestly unsuitable for achieving the aim pursued" [18]. As such, this places an onerous burden on defendants attempting to prove the disproportionate nature of the Commission's conduct [19].

At investigation stage, the principle of proportionality is relevant in a number of areas. Firstly, it must be taken into account in DGIV's choice of whether to use Art.11 or Art.14, and under Art.14, in deciding whether to proceed by way of simple mandate or by decision [20]. Clearly, the wide definition DGIV has given to its investigation powers and its use of the 'law as a resource' in its investigation choices form an area of potential conflict with this principle, particularly if a requirement of limited intervention is read into the proportionality tenet [21].

Several cases challenged the proportionality of the Commission's investigation choices. In particular, *National Panasonic* questioned DGIV's conduct in this context asserting that the principle of proportionality had been breached because the situation did not fulfil the criteria for a dawn raid and that the Commission had failed to apply the principle of limited intervention to its investigation choices [22]. In reply, DGIV argued that proportionality only operated to prevent onerous measures from being adopted for insufficient objectives, and thus, the exercise of its enforcement powers would only be disproportionate in extremely limited circumstances. DGIV insisted that, providing its conduct was reasonable, it did not have to justify its investigation choices and that its decision here was consistent with the principle of limited intervention [23]. Indeed, DGIV asserted that a dawn raid was not a particularly intrusive measure and was the only means available of preventing the destruction of evidence disclosing a serious infringement on the Treaty [24]. The ECJ upheld DGIV's absolute discretion in its investigation choices, stating that the proportionality of the investigation method was dependent on the necessity of the investigation in the individual circumstances of the case. As the decision here was aimed solely at uncovering an infringement of the Treaty, the Commission's actions were not disproportionate [25].

Elsewhere, defendants have taken a different approach, arguing that the attitude of the parties was relevant to the issue of proportionality. Only where there was prior evidence of non-cooperation by defendants was a dawn raid justified and necessary[26]. Whilst the Court in *Hoechst* upheld a general right to protection against arbitrary or disproportionate intervention, the ECJ stated that DGIV's investigation choices were not disproportionate. Again, the Court took the opportunity to affirm the Commission's discretion to decide for itself the necessity for its choice of investigation method[27].

The approach here discloses that DGIV uses its control of the process and the flexibility of the proportionality principle to interpret the scope of the tenet to suit its enforcement requirements. Thus, by placing a restrictive interpretation on what is disproportionate and a broad construction on the requirements of limited intervention, DGIV provides itself with a wide choice of permissible conduct. By down-playing the intrusive nature of dawn raids and setting its conduct against the overpowering object of Single Market integration, DGIV increases the reasonableness of its conduct. These techniques provide the Commission with ample scope to exercise its penal powers unfettered by the requirements of proportionality. This discussion also reveals the Court's unwillingness to exercise incisive control over the Commission. Whilst the Court are happy to recognise a general principle of proportionality in investigation, they regularly proceed to hold that the principle is not infringed in the instant case[28]. Instead, the Court have repeatedly upheld DGIV's discretion to decide for itself the necessity for its investigation choices. Combined with the heavy burden placed on defendants attempting to prove the disproportionate nature of the Commission's conduct, this approach allows potential conflict between DGIV's use of 'law as a resource' and the 'rule of law' to go unchecked.

A related area of conflict is the scope of inspectors' powers once on a firm's premises. In this context, there has been considerable criticism of the use of DGIV's powers and the resulting ambiguity over the extent of defence rights and obligations[29]. The degree of precision required in Art.14 decisions, the extent of inspectors' oral questioning and the duty to disclose confidential information to the Commission are all

subject to the proportionality principle[30]. Several firms in the study complained of the lack of specificity in Commission decisions and the use of that vagueness to conduct 'fishing trips'[31]. *Orkem* asserted that DGIV's request for information was unnecessary because it already possessed sufficient evidence on which to convict, thus, further investigation constituted a 'fishing trip'[32]. In addition, *AM&S* and *Van Landewyck* argued that full disclosure of confidential information was not necessary to the public interest and therefore excessive[33]. In all of these cases, the same pattern of Commission control and Court support illustrated above was evident. The Court repeatedly upheld the need to ensure effective enforcement of Reg.17 and confined themselves to insisting that, whilst DGIV's powers were governed by proportionality, it was for the Commission to decide the issue of necessity. Particularly in relation to the confidentiality issue, the Court justified its approach by setting DGIV's conduct against the need to uncover violations of the Treaty and the Commission's role as guardian of the Treaty[34]. As a result, only in *Van Landewyck* did the Court find that DGIV had infringed the proportionality tenet, and even here, the Court held that this impropriety did not vitiate the decision[35]. Again, by handing DGIV control over the scope of proportionality and by setting its conduct against the integration goal, the Commission is able to define the principle in a way which justifies its investigation choices. The ambiguity created by DGIV's use of the 'law as a resource', particularly regarding the precise location of the dividing line between the defendant's duty to co-operate and his right to silence, serves only to exacerbate the problems encountered in assessing the reasonableness of DGIV's behaviour. Consequently, the principle of proportionality exercises little real control over the Commission's decision-making. Rather, it is co-opted to legitimise DGIV's enforcement choices.

Proportionality is also relevant to other decisions taken by the Commission and the conditions imposed thereunder[36]. The case study has illustrated that DGIV uses its wide penal powers in this context to impose long-term control over defendants[37]. This use of the 'law as a resource' may conflict with the principle of proportionality. Whilst there were no challenges in the study in relation to final decisions following prosecution, *Transocean* did question the proportionality of conditions attached to an

individual exemption. Similarly, *Vichy* complained that DGIV had infringed the proportionality tenet when assessing its distribution agreement in relation to an Art.15(6) decision [38]. In *Vichy*, DGIV argued that the requirements of Vichy's distribution system were themselves disproportionate to the needs of the system and emphasised the threat posed by the arrangement to economic integration. The CFI fully accepted this approach to assessment [39].

Fines imposed by DGIV must also be proportional [40]. Here the Commission's case construction, which serves to increase the gravity and duration of fines, may result in sanctions being disproportionate to the actual violation committed [41]. Eight cases in the study complained that fines were disproportionate to the gravity and duration of the offence because of an erroneous assessment of their role, market size and/or the economic effect of the violation [42]. In all of these cases, DGIV's approach was to set the amount of the fine against the object of Single Market integration, emphasising the deliberate and serious nature of the threat that these violations posed to economic unity [43]. The CFI's approach in *Hercules* is typical of the Court's response to pleas of disproportionate sanctions. Here, the Court noted the "complex array of factors" to be considered and DGIV's discretion in the choice and weight of factors to be included in the fining assessment. They went on to uphold the need to punish behaviour hindering the aims of the Treaty and concluded that the Commission's approach to assessment was correct, and thus, its decision valid [44]. In several of these cases, the defendant's submission was rejected outright, though in some instances, the Court reduced the fine on other grounds [45].

Thus, it can be seen that the submissions relating to disproportional fines are rarely successful. This outcome not only illustrates DGIV's continuing control of enforcement and the Court's routine support, it also highlights problems relating to the nature of the Court's review powers. Under Art.173, the Court are limited to assessing the Commission's decision against the broad criteria of Art.190 and considering whether DGIV has taken the correct approach to the fining assessment [46]. The remainder of the assessment is an exercise of DGIV's discretion and therefore outside the Court's jurisdiction. As such, the Court are both unwilling and unable to

hold the Commission fully to account. A further reason why proportionality fails to exercise control over the Commission is that it measures DGIV's behaviour against the political aims of the Treaty. By setting the Commission's actions against such an over-powering objective, it is almost impossible to dispute the proportionality of DGIV's enforcement choices.

b)Equality

The principle of equality or non-discrimination requires that similar situations should not be treated differently, unless that difference can be justified objectively [47]. However, the application of this principle is problematic as what constitutes similar situations is debateable [48].

Equality of treatment is relevant at all enforcement stages. At investigation, DGIV's wide discretion over its choice of investigation method is open to discriminatory application. *Hasselblad* and *AEG* both claimed that the Commission used its investigation methods in a biased and discriminatory manner [49]. *National Panasonic* argued that DGIV's Art.14(3) decision was discriminatory as it represented a departure from normal practice [50]. Here, DGIV asserted that its decision was not a departure from previous practice and that dawn raids were justified in all cases of serious infringement. DGIV went on to highlight the need for Reg.17 to be interpreted and applied so as to give full effect to its ultimate purpose [51]. The ECJ simply upheld DGIV's discretion over its choice of investigation method, emphasising the need to interpret and apply the rules to enable the attainment of the Treaty's objectives [52]. As such, this case reveals a familiar pattern. Again, DGIV uses the objective of economic and political integration to justify its enforcement choices and its insistence that the effective application of Reg.17 is paramount. Again, complaints that the Commission's conduct undermines the 'rule of law' are met with the Court's deference to DGIV's discretion. This subordination of the principle of equality to Reg.17 at investigation renders it ineffective as a means of accountability.

Similar problems exist at prosecution. The ambit of DGIV's prosecutorial discretion and the lack of clarity over the factors influencing those choices place DGIV's prosecution decisions in potential conflict with the principle of equality [53]. Whilst the study has revealed numerous examples of similar cases having been treated differently, this has produced few actual allegations of inequality [54]. However, five cases did complain of discriminatory prosecution by DGIV. *VBBB*, *Van Landewyck* and *Vichy* all alleged that they had been prosecuted whilst similar restrictions were permitted elsewhere [55]. In *Polypropylene*, Hercules complained that DGIV's decision to prosecute it but not AMOCO or BP breached the principle of equality [56]. In all cases, the same approach was applied, asserting that the situations were not comparable and dismissing criticisms as irrelevant. In *VBBB*, differences were claimed on the basis that the agreement had "special characteristics" which were particularly restrictive and stemmed from its transnational character. DGIV also highlighted the need to consider the agreement in the light of Treaty objectives irrespective of any resulting inequality with the approach of MS. In *Polypropylene*, regular attendance by Hercules at cartel meetings was sufficient to justify DGIV's different approach. Whilst in *Vichy*, the CFI drew a distinction between a procedural decision relating to fines under Art.15(6) and a similar procedural decision under Art.15(1) [57]. As a result, all appeals were dismissed. In *VBBB*, the ECJ again took the opportunity to affirm the supremacy of Community law [58].

Several comments may be made. Attitudes, particularly in *VBBB* and *Van Landewyck*, reveal that the Treaty and its aims are more important than the principle of equality. The breadth of this tenet, particularly in relation to what constitutes comparable situations, clearly provides DGIV with the flexibility to construe the principle in a way which supports its enforcement choices. Whilst the Commission and Court argue that situations are not similar, little substantive discussion of actual differences is provided. From *Polypropylene* and *Vichy* it seems that very small, often formalistic, distinctions can justify different treatment. Yet in *Vichy*, it is hard to see the real difference between two procedural decisions, both under the same Article and both relating to fines. Similarly, in *Hercules*, non-attendance at meetings was used to

justify non-prosecution. Yet, elsewhere this has not been a bar to prosecution. Rather, the Commission has used the concept of collective responsibility to extend liablility and justify prosecution [59].

Finally, DGIV's broad discretion over fines has brought a number of appeals alleging discriminatory treatment. In *Polypropylene*, several firms argued that the Commission had failed to take into account mitigating factors which had been considered elsewhere [60]. In *Belasco*, members of the association complained that they had been discriminated against in comparison with non-members [61]. All claims of inequality were dismissed with familiar justifications. In *Belasco* and *SSI*, the Commission and Court found that the alleged inequalities were based on situations which could not be "*precisely compared*". In *Polypropylene*, the CFI upheld DGIV's discretion over fines, insisting that the fact that DGIV had considered such factors in other cases did not oblige it to consider them here. Whilst in *Woodpulp II*, the ECJ asserted that the Commission's differential treatment of firms was irrelevant and did not detract from the defendants own wrongdoing. Moreover, in several cases the Court stated that DGIV's differential treatment was vindicated by the serious and covert nature of the violation [62].

This examination of DGIV's approach to the principle of equality reveals that DGIV does little to uphold its value as a fundamental legal rule. Rather, it exploits the breadth of the principle to vindicate its enforcement choices. The Commission's task here is made easier by its use of the 'law as a resource' to increase its own powers, whilst creating ambiguity over the extent of substantive and procedural rules. This control of the process makes it easy to justify differences in practice as exercises of discretion. Again, DGIV emphasises the needs of the Treaty and its aims. By turning the focus towards the eradication of illegal market behaviour, and thus away from its own arbitrary choices, the Commission both justifies its conduct and makes it clear that effective enforcement is more important than equal treatment. This approach to equality has the full support of the Court. As a result, the scope for potential conflict between DGIV's use of the 'law as a resource' and the principle of equality is considerable.

c)Good Administration

It seems that the range of fundamental principles that the ECJ are prepared to recognise is not fixed and, on occasion, the Court have referred to a "general principle of good administration" [63]. Obviously, a principle of such wide ambit provides ample scope for judicial development and has been invoked in a range of situations. In *Lucchini*, the ECJ criticised the Commission's failure to respond to a communication as a "neglect of the rules of good administration" and reduced the fine accordingly [64].

DGIV's frequent resort to pragmatic solutions, revealed in the study, may bring it into opposition to this tenet. Certainly, the Commission does not have a reputation as an efficient administrator. Over the last 15 years, the House of Lords Select Committee has been particularly critical of the quality of DGIV's administration [65]. Specific concern has been expressed over the delays, inefficiencies and backlog of cases caused by internal bureaucracy and inadequate resources [66]. The absence of adequate direction and supervision, resulting in the haphazard conduct of enforcement, has also been condemned [67].

Not surprisingly, several cases in the study have challenged DGIV's respect for this principle [68]. Four of these challenges related to the authenticity of the SO or decision [69]. The high watermark was *BASF* where the CFI discovered such an extensive catalogue of maladministration that it declared the Commission's decision non-existent in law [70]. DGIV's response was to assert that the decision adopted broadly conformed with the rules and that, in any event, its own rules of procedure were an internal matter and breach of them did not alter the overall legal situation [71]. The CFI disagreed, declaring that in the interests of legal certainty, the procedural rules must be complied with [72]. In *VBBB*, the ECJ were more sympathetic towards DGIV and insisted that the burden was on the defendant to establish maladministration and that the defendant had failed to discharge that burden [73].

Other aspects of DGIV's conduct have also been criticised as breaches of good administration. Here, challenges in *Cement*, *Distillers* and *IAZ* are relevant. In *Cement*, the Commission's refusal to disclose the whole SO to defendants was challenged as a

breach of good administration, as was its failure to forward the minutes of the hearing to the Advisory Committee in *Distillers* [74]. Again in *Distillers*, DGIV attempted to legitimise its conduct by its construction of procedural requirements, insisting here that it was not *expressly* required to forward the minutes to the Advisory Committee [75]. The Court's response in *IAZ* is typical of these cases. Here, the Court criticised DGIV's conduct as "regrettable and inconsistent with the requirements of good administration" but nevertheless held that the decision was valid [76].

This examination reveals that the wide ambit of this tenet not only provides scope for judicial development, but also allows the Commission to use its dominance of the process to interpret the principle in a way which legitimises its conduct. DGIV's pragmatic attitude to the requirements of good administration seen in *BASF* and *Distillers* suggests that the Commission has little respect for this principle. Rather, these cases provide further illustration that political and pragmatic goals are considerably more important to DGIV than respect for the 'rule of law'. Whilst the Court have been sternly critical of the Commission, they still largely refuse to punish instances of breach with annulment. Consequently, this principle does little to control the quality of DGIV's decision-making. The Court's persistent refusal to annul serves only to legitimise procedural impropriety and thus promote the scope for continued maladministration. Once again, the CFI's tougher approach leaves much resting on their continued willingness to insist upon procedral integrity.

d)Legal Certainty

This principle requires that the application of the law to a particular situation must be clear and predictable. Its fundamental importance to Community law has been recognised by both the Commission and Court [77]. The tenet's wide application means that it has considerable implications for the interpretation and validity of DGIV's enforcement of competition law. In the past, it has often found expression in the principle of non-retroactivity, preventing administrative and legislative measures from taking effect without notice to those affected [78].

The study has revealed countless examples of DGIV's case construction and formalistic analysis creating ambiguity and thus increasing legal uncertainty. However, the following discussion will only highlight some of the most pressing problems.

At investigation, considerable legal uncertainty exists regarding the scope of both the Commission's powers and defence rights. Here, *National Panasonic* challenged DGIV's approach to investigation as undermining legal certainty. The defendants argued that both the vaguely reasoned Art.14(3) decision and the lack of clarity regarding the established practice for dawn raids left the legal position unclear. As already noted, the Court upheld DGIV's argument that it was not obliged to explain its choices and that a summary statement of reasons was sufficient to meet legal requirements [79]. Again, DGIV's ability to control the requirements of fundamental principles enables it both to meet those requirements and ensure that its discretion remains unfettered.

At prosecution and trial, there were few direct challenges alleging breach of the principle of legal certainty as many such concerns were subsumed in complaints of other procedural irregularities [80]. Such allegations centered around the vagueness of the SO, the fining assessment and inconsistencies between the SO and decision [81].

However, it is worth noting here that in *Woodpulp II*, both the AG and the Court condemned the uncertainty created by DGIV's deliberate vagueness which made analysis problematic [82]. *Ford* and *Vichy* did make direct challenges complaining that DGIV's decision left them uncertain as to their legal position and to the type of solution the Commission would consider acceptable [83]. Both appeals received little sympathy. In *Ford*, DGIV made it clear that the onus was on Ford to ensure that its distribution network complied with legal requirements. Similarly in *Vichy*, the CFI held that Vichy's administrative and commercial difficulties were irrelevant to the legality of the decision [84].

Again, DGIV's dominance of the process enables it to control the principle of legal certainty. By shifting the burden onto the defendant, the Commission absolves itself from responsibility for the legal certainty of its own enforcement choices. The lack of clarity created by DGIV's use of the 'law as a resource' makes it difficult for

defendants to discharge that burden, but equally simple for the Commission to justify any ambiguity as an exercise of discretion. DGIV's repeated manipulation of substantive and procedural rules indicates that it has little respect for legal certainty. Indeed, it has been demonstrated that the Commission's enforcement approach has a vested interest in creating legal uncertainty. Moreover, the unsympathetic and uncooperative attitude of both the Commission and Court suggests that EC competition law is not a 'user-friendly' system. These problems are exacerbated by the Court's exercise of their powers. In the past, both the ECJ's activist approach and their inconsistent attitude towards the role of precedent have served to increase legal uncertainty [85]. Moreover, administrative problems encountered by the Court, specifically delays in hearing cases, undermine legal certainty. Particularly in the context of Art.177 rulings, delays may tempt national courts to resolve issues themselves, resulting in inconsistencies between MS [86]. Consequently, the Court may serve to increase confusion and uncertainty. As such, their effectiveness in holding DGIV to account is questionable.

e)Legitimate Expectation

This principle is an element of the tenet of legal certainty, but, in the interests of clarity, it is being dealt with separately. The principle requires that, in the absence of overriding public interest needs, Community measures must not frustrate the legitimate expectations of the individuals concerned. Thus, this tenet operates to protect parties who have acted in reliance upon the law as it stands or appears to stand [87]. The wide ambit of this principle means that it can be adapted to suit most factual situations. As a result, it is a frequent ground of appeal [88].

The malleability of the law and DGIV's willingness to use that flexibility to meet enforcement needs may conflict with the principle of legitimate expectation in a number of areas. This may mean that, in practice, the principle exercises little control over DGIV's conduct. For instance, in relation to access, the CFI established in *Hercules* that the Commission's 12th Report created a legitimate expectation to access

which DGIV was bound to fulfil [89]. Despite this ruling, DGIV has made continued attempts to circumvent its responsibilities under this tenet, invariably by invoking a claim of confidentiality. Whilst this technique has met with some success, recent cases indicate that it may be short lived [90]. Similarly, *VBBB* claimed that DGIV had breached VBBB's legitimate expectations by failing to conduct a promised sector inquiry prior to taking a decision. The Court placed a restrictive interpretation on the Commission's statements holding that they were not undertakings, but merely declarations of its intention to investigate the market in books throughout the Community, and so did not preclude DGIV from prosecuting individual agreements [91]. This ruling both makes it clear that enforcement is paramount and ensures that DGIV's enforcement choices are not hindered by the principle of legitimate expectation [92].

The Commission and Court have also employed formalism to evade the requirements of this tenet. In *Distillers*, despite the fact that DGIV had all the relevant information and had negotiated with Distillers regarding exemption, the Court held that exemption could not be granted because the application for exemption was not submitted on the correct form [93]. A similar pattern is repeated in *IAZ*, where IAZ claimed that DGIV's prosecution and fining of its agreement breached this tenet. IAZ argued that the Commission had raised a legitimate expectation in them that their co-operation in modifying the agreement would be rewarded with a favourable decision, and that no fines would be imposed in respect of agreements exempt from notification under Art.4(2). DGIV escaped its duty to fulfil these legitimate expectations by insisting that the modifications to the agreement were insufficient and that the agreement was not properly notified and was not exempt from notification, and so, fines were justified. The ECJ upheld DGIV [94]. Other cases have also complained that the Commission has failed to meet their legitimate expectation to have co-operation and other mitigating factors taken into account. These claims also received little sympathy from the Court [95].

A final aspect of legal certainty/legitimate expectation is the fixing of time limits for the imposition of fines. In order to protect firms from unduly extended proceedings and to encourage the Commission to act speedily, DGIV may only impose

procedural fines within six years of the offence and within ten years in other situations [96]. This study has shown that DGIV's case construction, particularly its use of the concept of complex infringement, not only increases the gravity and duration of offences, but also serves to enable DGIV to circumvent its responsibilities under 'rule of law' principles [97]. A number of cases have unsuccessfully appealed against the Commission's approach [98].

Once again, DGIV's dominance of the process allows it to dictate what is required of it under the principle of legitimate expectation. In this way, the Commission is able to evade its responsibilities under this tenet, whilst ensuring that its discretion remains unfettered. Although this technique provides DGIV with maximum flexiblity, it does so at the expense of the 'rule of law'. Certainly, the Commission's willingness to flout established caselaw on access indicates that it has little respect for the legitimate expectations of defendants. For DGIV, the effective enforcement of Reg.17 is vastly more important. Its attitude elsewhere in the case study illustrates its inclination to place enforcement before principle. In so doing, DGIV not only undermines legitimate expectations, but also increases legal uncertainty. Clearly, the situation is one in which the principle of legitimate expectation does not control the Commission - rather the Commission controls it.

B)CONCLUSION - 'RULE OF LAW'

This analysis has demonstrated that, at every point, the Commission's pursuit of its political and pragmatics goals compromises its exercise of discretion by requiring the 'rule of law' to be subordinated to these twin objectives. This disrespect for fundamental legal principles allows the effective enforcement of Reg.17 to prevail over the 'rule of law'. This outcome is achieved by DGIV's dominance of the process, which combined with the flexibility of the principles under consideration, enables the Commission to define the 'rule of law' to meet enforcement needs. This control over

the construction of these legal principles means that the 'rule of law' is co-opted and used to legitimise DGIV's enforcement decisions. Consequently, DGIV's choices do not complement the 'rule of law' - rather the 'rule of law' is used as a resource to promote the Commission's choices. So, although DGIV's conduct does superficially adhere to fundamental principles, there is little cause for celebration. The Commission's repeated willingness to manipulate such principles for its own purposes reveals an underlying contempt for the 'rule of law'.

The Commission is assisted in this approach by the Court who appear both unwilling and unable to exercise incisive control over DGIV's decision-making. The Court have shown excessive deference to the Commission, repeatedly upholding DGIV's discretion to decide the scope and application of the principle under consideration. Invariably, the Court either affirm the principle under consideration, but go on to hold that it has not been breached in the instant case, or they admit that the tenet has been breached, but insist that this does not vitiate the decision [99]. So, whilst both the Commission and Court recognise the theoretical importance of these principles, the case study shows that DGIV, in particular, has no intention of allowing 'rule of law' principles to hinder the attainment of political and pragmatic goals. Consequently, any recognition of the 'rule of law' is little more than lip-service ; any adherence to it, little more than coincidence. Research has criticised several aspects of the Court's approach which serve to limit the effectiveness and equity of their review. Rasmussen has condemned the ECJ's past activism as allowing politics to prevail over justice. He asserts that the Court's constitution-making role has meant that political needs rather than legal issues have informed their decision-making, impairing their function as "trustworthy neutrals". He insists that the ECJ's attempts to protect Treaty aims and achieve "ever closer union" are actually destroying economic integration by undermining judicial authority and legitimacy thereby producing disrespect for, and non-compliance with, Community law [100]. Cruz Vilaca has also criticised the subordination of justice to political and pragmatic goals. He asserts that delays in hearing cases have hindered the efficient administration of justice, and that the resulting backlog of cases, combined with the ECJ's poor fact-finding ability, have

caused the Court to take a pragmatic approach to their decision-making. The consequent injustice and inconsistency have impaired the 'rule of law' significantly[101].

A further and even more fundamental problem affects the quality of the Court's scrutiny. As previously noted, the Court's review powers are administrative in character, and thus largely confined to ensuring that the Commission stays within the bounds of its discretion. In contrast, DGIV possesses and employs extensive penal powers. Thus, a mismatch exists between the nature and scope of DGIV's enforcement powers and those of the Court's review powers. DGIV exploits this disparity to the full, using it to subordinate the 'rule of law' to Reg.17. Earlier analysis demonstrated that DGIV achieved its political and pragmatic objectives by creating an imbalance between itself and defendants and maximising its own powers whilst curtailing defence rights. DGIV uses a similar technique here, employing its wide discretionary powers to dominate the review process and dictate both the scope and outcome of the review. The consequent mismatch between the characterisation and application of the enforcement process and that of the review process means that the Court's review is necessarily inadequate. Yet under Art.173, there is little that the Court can do to compensate for this, leaving the Commission largely unaccountable[102].

The outcome of DGIV's approach is target driven justice, in which the entire process is geared to achieving political and pragmatic goals. To this end, fundamental legal principles are manipulated and ignored, disclosing the considerable scope within EC antitrust for legitimate procedural impropriety[103]. Whilst DGIV's activities may be legitimate, in practical terms, the Commission's use of the 'law as a resource' inflicts considerable damage. Its highly discretionary approach has been bought at the expense of fundamental principles, producing widespread evidence of inconsistency, inefficiency, uncertainty and substantive injustice. Given such consequences, it is hard to see how EC competition law can be regarded as 'user-friendly'. Goyder argues that a 'user-friendly' system should provide a fair procedure allowing a right to comment, full access to documents and clear rights of appeal[104]. The study has shown that DGIV takes every opportunity to curtail both the right to comment and to access. Similarly, the burden on defendants at appeal and the inadequacy of the Court's review

powers make a right of appeal virtually worthless. Thus, DGIV does not provide a fair system. Secondly, a 'user-friendly' system should be administratively efficient and should provide a clear timetable for enforcement [105]. This evaluation has revealed that DGIV's administration is characterised by delays, backlogs, bureaucratic inadequacies and widespread criticism of a lack of supervision and direction. As such, the Commission does not provide an efficient system. 'User-friendliness' also requires that decision-making be transparent and complete [106]. DGIV's discretionary practices run directly counter to this requirement. The study has illustrated the Commission's vested interest in maintaining a state of ambiguity over the nature and scope of substantive and procedural rules. Moreover, the requirements of Art.190 are so broad that DGIV's reasoning, particularly in sanctioning decisions, remains far from complete. Consequently, the Commission's enforcement approach is neither transparent nor complete. Finally, 'user-friendliness' requires a substantively sound system where matters are decided on as legal cases based on legal principles. Specifically, outcomes should not be political decisions dressed up as legal cases [107]. The study has illustrated that DGIV's enforcement choices are based on political and pragmatic goals not legal principles. The widespread evidence of disproportionate and discriminatory treatment, refusals to fulfil defendants' legitimate expectations and an absence of legal certainty reveal that DGIV's approach is far from substantively sound. Yet, the process is geared to disguising these political decisions as legal matters. Thus, DGIV does not provide a substantively sound system. It is obvious from the above analysis that EC competition law is not a 'user-friendly' system - merely 'Commission-friendly'.

Above all, this 'rule of law' analysis makes clear the true focus of EC competition law. The repeated references to political and pragmatic goals as vindication of DGIV's manipulation of the law makes explicit the political and pragmatic nature of Commission decision-making. But, it has also made clear that this focus is the cause of considerable caprice and injustice. Whilst such objectives continue to dominate decision-making, one seems forced to accept that competition may not be an entirely justiciable matter. More than that, research indicates that this

persistent focus on non-justiciable issues may ultimately undermine Community law and bring about economic disunity.

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1 Dostoevsky *Notes from Underground.*

2 As already discussed in Ch1, the 'rule of law' in this thesis refers to those general principles of law and fundamental rights developed by the ECJ in accordance with which it interprets Community law and reviews the legality of the actions of Community institutions. Such principles include legal certainty, legitimate expectation, equality, proportionality, good administration and natural justice. See cases of *Internationale Handelsgesellschaft* [1970] ECR 1125 ; *Nold v Commission* [1974] ECR 491 and *Amsterdam Bulb* [1977] ECR 137. Discussed in Schwarze 'The Administrative Law of the Community and the Protection of Human Rights' *CMLR* [1986] 401 and Dauses 'The Protection of Fundamental Rights in the Community Legal Order' *ELR* [1985] 398.

3 The requirements of natural justice will not be considered here as they have been dealt with in detail on the examination of defence rights.

4 See Goyder 'User Friendly Competition Law' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 1 and Wood 'User Friendly Competition Law in the United States' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 6. The recommended attributes include transparency, fair procedure efficiency, consistency and substantive soundness. Both commentators suggest that such features would increase respect for, and thus compliance with, competition rules. Moreover on the issue of substantive soundness, Goyder at pp 3-4, asserts that this would enhance legal certainty and make explicit any political element in the decision.

5 See discussion in Dauses 'The Protection of Fundamental Rights' at pp 405-407.

6 For more thorough review of thr issues under consideration, see : Due 'The Court of First Instance' *YBEL* [1988] 1 ; Vesterdorf 'The Court of First Instance after Two Full Years in Operation' *CMLR* [1992] 897 ; Cruz Vilaca 'The Court of First Instance of the European Communities : A Significant Step towards the Consolidation of the European Community as a Community Governed by the Rule of Law' *YBEL* [1990] 1 ; Arnull 'Refurbishing the Judicial Architecture of the European Community' *ICLQ* [1994] 296 ; Rasmussen *On Law and Policy in the European Court of Justice : A Comparative Study in Judicial Policymaking* Martinus Nijhoff (1986) ; Rasmussen 'Between Self Restraint and Activism : A Judicial Policy for the European Court' *ELR* [1988] 28 ; Cappelletti 'Is the European Court of Justice "Running Wild" ?' *ELR* [1987] 3 ; Weiler 'The Court of Justice on Trial' *CMLR* [1987] 555 ; Lasok *The European Court of Justice : Practice and Procedure* (2nd Edn) Butterworths (1994) at pp 356-363 ; Kerse *EC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) Ch9 ; Wyatt and Dashwood *The Substantive Law of the EEC* Sweet and Maxwell(1993) at pp 91-95 ; Schermers and Waelbrock *Judicial Protection in the European Communities* (5th Edn) Kluwer (1992) ; Brown and Jacobs *The Court of Justice of the European Communities* (3rd Edn) Sweet and Maxwell (1989) ; Bengoetxea *The Legal Reasoning of the European Court of Justice* Clarendon Press (1993) ; de Wilmars 'The Caselaw of the ECJ in Relation to the Review of the Legality of Economic Policy in Mixed Economy Systems' *LIEI* [1981/1982] 1 ; Usher 'The Influence of National Concepts on Decisions of the ECJ' *ELR* [1976] 359 ; Usher 'Exercise by the ECJ of its Jurisdiction to Annul Competition Decisions' *ELR* [1980] 287 ; Wyatt 'New Legal Order or Old' *ELR* [1982] 147 ;

Pescatore 'Fundamental Rights and Freedoms in the System of the European Communities' *AJIL* [1970] 343.

7 The ECJ have developed a body of caselaw on this issue requiring Treaty provisions to be applied in accordance with general legal principals common to MS. See *Internationale Handelsgesellschaft* [1970] ECR 1125, *Nold v Commission* [1974] ECR 491 and *Amsterdam Bulb* [1977] ECR 137. Art.215 of the Treaty similarly recognises the role of general principles of natural law as legitimite sources of Community law. Interesting discussions of the juridical basis of these principles and their sources in national law may be found in Wyatt 'New Legal Order or Old' ; Usher 'The Influence of National Concepts on Decisions of the ECJ' ; Dauses 'The Protection of Fundamental Rights'; Schwarze 'Protection of Human Rights' ; Pescatore 'Fundamental Rights and Freedoms'.

8 Kerse *EC Antitrust Procedure* at para 9.04, notes that whilst four separate grounds exist, the Court's flexible approach means that these grounds have lost their individual importance. Schermers agrees. See "The Law as it Stands on the Appeal for Annulment' *LIEI* [1975] 95.

9 On this, see *Topfer v Commission* [1978] ECR 1019. See also, discussion in Kerse *EC Antitrust Procedure* at para 9.19, who considers that this ground is probably wide enough to encompass the other three grounds of review.

10 More detailed treatment may be found in Kerse *EC Antitrust Procedure* Ch9 ; Schermers and Waelbrock *Judicial Protection in the European Communities* ; Brown and Jacobs *The Court of Justice of the European Communities* ; Lasok *The European Court of Justice.*

11 See Lasok *The European Court of Justice* at pp 356-363 ; Kerse *EC Antitrust Procedure* at para 9.04.

12 See discussion in Lasok *The European Court of Justice* at pp 356-357. The ECJ's decision-making has been trenchantly criticised by Rasmussen. See Rasmussen *On Law and Policy in the European Court of Justice* and Rasmussen 'Between Self Restraint and Activism'. They have also suffered many administrative problems. On this, see Cruz Vilaca 'The Court of First Instance'. For a critique of Rasmussen's comments, see Cappelletti 'Is the European Court of Justice "Running Wild" ?' and Weiler 'The Court of Justice on Trial'. In contrast, the CFI has been more willing to critically examine such issues. This is discussed in Vesterdorf 'The Court of First Instance' and in Arnull 'Refurbishing the Judicial Architecture'.

13 For background information on this section, see : Kerse *EC Antitrust Procedure* Ch8 ; Steiner *Textbook on EEC Law* (2nd Edn) Blackstone Press (1988) ; Goyder 'User Friendly Competition Law' ; Wood 'User Friendly Competition Law in the United States' ; Dauses 'The Protection of Fundamental Rights' ; Schwarze 'Protection of Human Rights' ; Kon 'Article 85 Para 3 : A Case for Application by National Courts' *CMLR* [1982] 541 ; McKenzie Stuart 'Legitimate Expectation and Estoppel' *LIEI* [1983] 53 ; Sharpston 'Legitimate Expectations and Economic Reality' *ELR* [1990] 103 ; Coppel 'Curbing the Ruling Passion : A New Force for Judicial Review in the European Commmunities' *ECLR* [1992] 143 ; Ghandi 'Interaction between the Protection of Fundamental Rights in the EEC and under the European Convention on Human Rights *LIEI* [1981/2] 1 ; Mendelson 'The ECJ and Human Rights *YBEL* [1981] 125 ; McBridge and Brown 'The UK, the European Community and the ECHR' *YBEL* [1981] 167 ; Boukema 'Preservation of the Judiciary in the EEC' *LIEI* [1980] 87 ; D.Stevens 'The Comfort Letter : Old Problems, New Developments' *ECLR* [1994] 81 ; Lasok *The European Court of Justice* ; Brown and Jacobs *The Court of Justice of the European Communities* ; Schermers and Waelbrock *Judicial Protection in the European Communities* ; Cruz Vilaca 'The Court of First Instance' ; Vesterdorf 'The Court of First Instance' ; Waelbrock 'New Forms of Settlement of Antitrust Cases and Procedural Safeguards: Is Regulation 17 Falling into Abeyance?' *ELR* [1986] 268 ; Mancini 'The Making of a Constitution for Europe' *CMLR* [1989] 595 ; Arnull 'Owning Up to Fallability : Precedent and the Court of Justice' *CMLR* [1993] 247 ; Arnull 'Refurbishing the Judicial Architecture' ; Rasmussen 'Between Self Restraint and Activism' ; Cappelletti 'Is the European Court of Justice "Running Wild" ?' ; Weiler 'The Court of Justice on Trial' ; Bengoetxea *The Legal Reasoning of the European Court of Justice.*

14 Both vertical and horizontal case studies will be used in this examination of the Commission's conduct.

15 *Denkavit Nederland BV v Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171 at para 25. Similarly, in *Internationale Handelsgesellschaft* [1970] ECR 1125 at p 1127, AG Dutheillet de Lamothe stated that proportionality required that "the individual should not have his freedom of action limited beyond the degree necessary for the public interest". The scope of the

principle is discussed further in Kerse *EC Antitrust Procedure* at para 8.25 ; Wyatt and Dashwood *The Substantive Law of the EEC* at pp 91-95 and Schermers and Waelbrock *Judicial Protection in the European Communities* at para 127.

16 See Steiner *Textbook on EEC Law* at p 47 ; Kerse *EC Antitrust Procedure* at para 8.27. Art.5 ECSC insists upon the application of the principle of limited intervention, but there is no similar requirement in the EEC Treaty. However, the principle could still be applied by the Court as a general principle of law. See discussion by AG Roemer in *Acciaieria e Tubificio di Brescia v Commission* [1960] ECR 71 at pp 88-90.

17 Lavoie 'The Investigative Powers of the Commission with Respect to Business Secrets under Community Competition Rules' *ELR* [1992] 20 at p 27.

18 *SA Biovilac NV v Commission* [1984] ECR 4057 at para 17.

19 See discussion in Kerse *EC Antitrust Procedure* at para 8.26.

20 It should be noted that the necessity for the investigation is explicit in both Arts. 11 and 14.

21 See Kerse *EC Antitrust Procedure* at para 8.27. It will be recalled that the Commission's use of the 'law as a resource' was particularly evident in its routine use of Art.14 in both horizontal and vertical cases and DGIV's preference for dawn raids.

22 *National Panasonic* at p 2050.

23 *National Panasonic* at p 2050.

24 *National Panasonic* at pp 2046, 2048, 2050. At p 2046, DGIV insisted that National Panasonic's arguments were based on the erroneous assumption that a dawn raid was "a drastic, damaging and permanent action which adversely affects the interests of the firm involved".

25 *National Panasonic* at p 2059.

26 See *Hoechst* [1989] ECR 2859, *Dow Chemical Iberica* [1989] ECR 3165 and *Dow Chemical Benelux* [1989] ECR 3150.

27 See *Hoechst* [1989] ECR 2859 at paras 15-20. See also *Dow Chemical Iberica* [1989] ECR 3165 and *Dow Chemical Benelux* [1989] ECR 3150. The Court also upheld the proportionality of investigations in *SEP* [1992] 5 CMLR 33.

28 This tendency has been criticised strongly by Coppel in 'Curbing the Ruling Passion'.

29 See particularly, evidence given to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 16-17.

30 See Kerse *EC Antitrust Procedure* at para 8.26.

31 See *National Panasonic*, *Hoechst* [1989] ECR 2859, *Dow Chemical Iberica* [1989] ECR 3165, *Dow Chemical Benelux* [1989] ECR 3150, *LdPE*, *Orkem* [1989] ECR 3283, *Italian Flat Glass* and *Soda Ash*.

32 *Orkem* [1989] ECR 3283 at p 3348.

33 See *AM&S* at p 1582 and *Van Landewyck* at pp 3238-3239. In the latter case, DGIV had disclosed confidential information to third party complainants. In *SEP* [1992] 5 CMLR 33, the defendant complained that DGIV's Art.11 request for disclosure of a particularly confidential document was disproportionate. SEP feared that the document may fall into the hands of the Dutch Government with whom it had a contractual relationship and that this may affect the relationship.

34 See *National Panasonic* at pp 2059-2060, *AM&S* at pp 1609-1613, *Van Landewyck* at pp 3238-3239, *Hoechst* [1989] ECR 2859 at paras 15-20, 42, *Dow Chemical Iberica* [1989] ECR 3165 at p 3191, *Dow Chemical Benelux* [1989] ECR 3150 at para 10, *Orkem* [1989] ECR 3283 at pp 3330, 3348, *LdPE* at p 418. See also *Italian Flat Glass*, *Soda Ash* and *SEP* [1992] 5 CMLR 33.

35 *Van Landewyck* at p 3239. In *Hoechst* [1989] ECR 2859 at para 42, the Court admitted that the lack of specificity in DGIV's Art.14 decision was open to criticism but broadly fulfilled the requirements of Art.190 of the Treaty.

36 Ie final decisions and individual exemptions. See Kerse *EC Antitrust Procedure* at para 8.26.

37 See discussion in earlier chapters regarding DGIV's penal sanctioning in Ch6 and Ch8 supra.

38 See *Transocean* [1974] ECR 1063, particularly discussion by AG Warner, *Vichy* at p 457 et seq. See also discussion in Usher 'Exercise by the ECJ of its Jurisdiction to Annul Competition Decisions'.

39 See *Vichy* at pp 457-465. The CFI also applied a proportionality test to Vichy's agreement finding that the requirement of pharmacist was disporportionate to the needs of the system. The Court's formalistic assessment in this case has been criticised by Korah in 'Selective Distribution' *ECLR* [1994] 101. In *Transocean*, the Court upheld the defendant's right to comment prior to the imposition of conditions.

40 See Kerse *EC Antitrust Procedure* at para 8.26. See also cases of *United Brands* [1978] 1 CMLR 429 at para 302 and *BMW Belgium* [1980] 1 CMLR 370 at para 47.

41 See discussion in Ch6 and Ch8 regarding the sanctioning of horizontal and vertical cases. This is also criticised by Van Bael in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at p 221.

42 Firms involved in the *Polypropylene* and *Woodpulp* cartels, *IAZ*, *Hasselblad* and *MDF* complained that fines were disproportionate to their role and economic capacity. In *Belasco*, *CRAM* and *AEG*, fines were alleged to be disproportionate to the market effect of the violation. In addition, *Hoechst* [1989] ECR 2859 also claimed that the amount of a periodical penalty payment was disproportionate. *PVC II* is also appealing against disproportionate fines.

43 In *MDF* at p 1902, the Commission insisted that the public interest necessitated the imposition of heavier fines to deter firms from reaping unlawful profits. See also *AEG* at p 3320, *Hasselblad* at p 594, *IAZ* at p 3415, *CRAM* at p 1695, *Belasco* at p 115, *Woodpulp II* at p 561 and *Polypropylene*, particularly *Hoechst* [1992] ECR 629 at p 740.

44 *Hercules* at pp 322-325. See also *MDF* at pp 1904-1905, *IAZ* at pp 3417-3418, *Belasco* at pp 125-128, *Hasselblad* at p 594 and *AEG* at p 3220.

45 In *AEG*, *IAZ*, *Belasco* and *Polypropylene*, the submission was dismissed outright. In *AEG* at pp 3263-3270, AG Reischl disagreed with the Court and recommended that the fines be reduced on the basis that DGIV had exaggerated its claims of discriminatory practice, so that the fine was disproportionate to the market effect of the violation. In *Polypropylene*, *Shell* [1992] ECR 757 at p 893, Shell's fine was reduced because of an incorrect assessment of its participation in the offence. *MDF* and *Hasselblad's* fines were also reduced because of incorrect legal assessment by the Commission. In *Hasselblad*, the Court acknowledged the relatively small size of HGB in reducing its fine. In *CRAM* and *Woodpulp II*, the Court did not rule on the issue of proportionality because of partial annulment of the respective decisions. Hoechst's claims that the periodical penalty payment was disproportionate was also dismissed. See *Hoechst* [1989] ECR 2859.

46 Kerse *EC Antitrust Procedure* at para 9.04. Under Art.172 of the Treaty, the Court have unlimited jurisdiction to cancel, reduce or increase fines, though even here it may not remake the contested decision. On this, see discussion by Kerse *EC Antitrust Procedure* at para 9.02 and the CFI in *SIV* at para 318.

47 See Kerse *EC Antitrust Procedure* at para 8.12A ; Brown and Jacobs *The Court of Justice of the European Communities* at pp 264-265 and Steiner *Textbook on EEC Law* at p 49.

48 See Steiner *Textbook on EEC Law* at p 49.

49 *Hasselblad* at p 567 and *AEG* at pp 3187-3188. In *AEG*, AG Reischl at p 3242, criticised DGIV's use of its investigation powers.

50 *National Panasonic* at pp 2038-2040. Until *National Panasonic*, dawn raids were rare, even in serious cases the Commission proceeded by way of Art.11 or Art.14(2). Discussed by Harding *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) Ch2. *National Panasonic* at p 2048. argued here that in previous Art.14(3) decisions DGIV had given the party a right to be heard prior to exercising the decision.

51 *National Panasonic* at pp 2039-2048. The Commission also insisted that no-one had complained previously about its use of dawn raids.

52 *National Panasonic* at pp 2056-2057. Claims in *Hasselblad* and *AEG* were also dismissed.

53 For further details of DGIV's varying approach to the prosecution of horizontal and vertical cases, see respectively Chs 4, 5 and Chs 7, 8 supra.

54 As pointed out earlier, this is largely due to the negotiated and covert nature of such compromises.

55 *VBBB* at p 29, claimed inequality because other MS permitted rpm of books ; *Van Landewyck* at p 3249, claimed that the Commission had prosecuted Fedetab whilst allowing similar restrictions in other MS ; *Vichy* at p 423, alleged discriminatory treatment in relation to an Art.15(6) decision on the basis that similar agreements had been negotiated and settled, and that in similar situations, DGIV had consulted the Advisory Committee before taking such decisions. See also Hercules in *Polypropylene* and KEA in *Woodpulp II*.

56 *Hercules* at pp 212-213. Similarly,in *Woodpulp II* at pp 558-561, members of KEA alleged they had been discriminated against in comparison with Finncell and other producers who had not been prosecuted or who had been treated more leniently.

57 See *VBBB* at pp 30-31, *Polypropylene* at pp 213, 318-319, *Vichy* at pp 424, 429, *Van Landewyck* at p 3249 and *Woodpulp II* at p 586. In *Hercules* at p 213, AG Vesterdorf agreed with the Commission, stating that it had not been demonstrated that DGIV's conduct was based on anything other than objective reasons. He also upheld the Commission's broad discretion over the decision to prosecute. In *Vichy* at p 429, the CFI said that a requirement to consult the Advisory Committee prior to a decision to fine for providing incorrect information was no basis for concluding that the same procedure should be followed under Art.15(6).

58 See *VBBB* at p 64, *Hercules* at p 319, *Vichy* at p 429, *Woodpulp II* at pp 557, 586 and *Van Landewyck* at p 3249. In *Van Landewyck* and *Woodpulp II*, the Court asserted that the Commission's treatment of other cases was irrelevant and did not detract from the defendant's own anti-competitive conduct.

59 This occurred particularly in the *Polypropylene* and *LdPE* cartels.

60 See *Hercules* at p 323, *Hoechst* [1992] ECR 629 at p 740, *Shell* [1992] ECR 757 at p 897 and *Huls* [1992] ECR at p 619 in the *Polypropylene* cartel. The mitigating factors in question were those of sectoral crisis and co-operation by firms involved. Defendants here contrastd DGIV's approach to these factors in *Zinc Producers* and *National Panasonic* with its treatment of members of the *Polypropylene* cartel. Similarly *SSI* at p 3854, alleged it had been unfairly treated in comparison with *Fedetab* where no fines were imposed. See also, appeals by *MDF*, *Woodpulp II* and *Belasco*.

61 *Belasco* at p 100. Also various members of the *Woodpulp* cartel, see *Woodpulp II* at p 593, alleged discriminatory imposition of fines in comparison with other members of the cartel. *MDF* at p 1878, complained that its fines breached the equality principle because it was much larger than the normal level of fine.

62 See *Belasco* at p 117 (italics inserted). At p 125, the Court based the difference on the fact that members and non-members were not party to the same violation. In *SSI* at pp 3859, 3880, here the difference was that *Fedetab* had not imposed a binding agreement on prices. Also, *Polypropylene* at p 329 and *MDF* at p 1904, where the Commission's discretion was also affirmed and *Woodpulp II* at p 593. The view here was supported by AG Darmon at p 556. In *Polypropylene* at p 329, *SSI* at p 3880 and *MDF* at p 1903, the deliberate nature of the offence was found to justify the Commission's approach.

63 *Kuhner* [1980] ECR 1671 at p 1698.

64 *Lucchini* [1983] ECR 3083 at p 3095.

65 See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at pp 23-24 ; House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at para 38-39 ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at para 67. Numerous other commentators have complained, eg Forrester and Norall 'The Laicisation of Community Law : Self Help and The Rule of Reason : How Competition Law Is and Could Be Applied' *CMLR* [1984] 11 ; Goyder 'User Friendly Competition Law' ; Van Bael 'Transparency of EC Commission Procedings' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 192.

66 See particularly, House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at p 24 and Written Submissions to the Select Committee by Reynolds, Lever, JWP and Van Bael, Minutes of Evidence at p1; p 161 ; p 59 and pp 220-221 respectively.

67 See particularly, Written Submissions by JWP and Van Bael to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, Minutes of Evidence at pp 59, 61 and pp 220-221 respectively. See also, comments in House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at para 67, who urged major reform of the Commission's investigation practices criticising the Commission's tardiness in informing firms of the outcome of investigations. It recommended the imposition of a time limit on the Commission.

68 *PVC/BASF* (see also *PVC I* and *PVC II* which is currently on appeal), *Woodpulp II*, *VBBB*, *IAZ*, *Cement*, *AWS* and *Distillers*.

69 See *BASF*, *Woodpulp II*, *VBBB*, *AWS*.

70 See *PVC* cartel, *BASF* at p 393. On appeal in *PVC I*, the ECJ set aside the CFI's judgement and annulled the Commission's decision on the ground that it was not duly authenticated. *PVC II* is now on appeal on a number of grounds, including further breach of the principle of good administration. In *Woodpulp II*, the defendant complained that the Commission has breached the principle because the SO was not signed on the day it was dated. In *VBBB*, the defendants alleged breach of the principle on the ground that the official who signed the SO was not authorised to do so. In *AWS*, the defendant claimed that a lack of individuality and the incorrect naming of the firm in the decision meant that the defendant (AWS) was not sufficiently identified to establish liability.

71 See *BASF* at pp 384, 388. In *Woodpulp II* at p 442, the Commission excused its error on the grounds of heavy workload. In *VBBB*, DGIV asserted that the official was properly authorised. Error in the decision was also pleaded in *AWS*.

72 *BASF* at p 388. As noted above, in *PVC I*, the ECJ set aside the CFI's judgement and annulled DGIV's decision on the ground that it was not duly authenticated. In *Woodpulp II*, the ECJ did not rule directly on the matter, but did substantially annul DGIV's decision because of numerous discrepancies and inadequacies relating to the SO. Here AG Darmon at pp 442-443, severely criticised the Commission's maladministration, but felt that it did not vitiate the actual decision. In both *Woodpulp II* and *SIV*, the Commission's methodology was also criticised by the Court. In *AWS* at pp 43-44, the CFI dismissed DGIV's plea of error, noting that this was not he first time DGIV had made this plea to the Court whilst failing to notify the firm concerned of errors relating to the operative part of the decision. The Court accordingly annulled the decision in respect of AWS.

73 *VBBB* at pp 56-57.

74 *Cement* at p 251 and *Distillers* at p 2293. Also *IAZ* at p 3387, challenged DGIV's decision to ignore a draft agreement attempting modification as a breach of the principle of good administration.

75 See *Distillers* per AG Warner at p 2294 (italics inserted). In *IAZ* at p 3409, DGIV's justification of its conduct was that it doubted that ANSEAU genuinely intended to modify its agreement.

[76] *IAZ* at p 3409. In *Cement* at pp 251, 257, the President of the CFI stated that the Commission's conduct was "intolerable for the public interest", but dismissed the application on the grounds that the Commission's refusal of full access did not cause irreparable damage. In *Distillers*, the Court did not rule directly on the issue, but AG Warner at p 2294, criticised DGIV's bureaucratic inefficiency as a prima facie breach of an essential procedural requirement, though he doubted that the infringement would have altered the outcome.

[77] By the Commission in eg its 7th Report on Competition Policy 1977 at p 69, and more recently, by Ehlerman in his Written Submission to House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-I) HMSO, Minutes of Evidence at p 110. See also comments by the Court in a range of cases, eg *Defrenne v Sabena (No.2)* [1976] ECR 455, and more recently, in *Tetra Pak* [1990] II ECR 309 at paras 32-38. For further discussion of the cases and the application of this principle, see Schermers and Waelbrock *Judicial Protection in the European Communities* at paras 86-89 ; Kerse *EC Antitrust Procedure* at paras 8.22-8.24 ; Wyatt and Dashwood *The Substantive Law of the EEC* at pp 91-95.

[78] Eg *Racke* [1979] ECR 69 at p 84. In competition law, it is particularly relevant in the context of provisional validity and in relation to the competency of national courts under Art.9(3)/Reg.17. On this, see discussion by Kerse *EC Antitrust Procedure* at paras 8.22-8.23 ; Korah 'Comfort Letters - Reflections on the Perfume Cases' *ELR* [1981] 14 ; Kon 'Article 85 Para 3'. For a contrary view, see Steindorff 'Article 85 : No Case for Application by National Courts' *CMLR* [1983] 125

[79] *National Panasonic* at pp 2047-2048, 2059.

[80] Principally breach of Art.190 of the Treaty.

[81] Numerous cases made complaints of this nature. Ten horizontal cases and five vertical cases complained of problems relating to the SO or inconsistency between the SO and the decision : *Polypropylene*, *Woodpulp II*, *Belasco*, *VBBB*, *SSI*, *Van Landewyck*, *IAZ*, *GCB*, *SIV*, *PVC* and *AEG*, *Vichy*, *MDF*, *Hasselblad* and *Ford*. Many firms also complained of the inadequacy of the fining calculation, eg *Polypropylene*, *GCB*, *MDF* and *Hasselblad*. These cases will not be dealt with in detail here as they have been dealt with thoroughly elsewhere, see Chs 4, 6 and Chs 7, 8 supra.

[82] *Woodpulp II* at pp 490, 572. Also at pp 448, 467, AG Darmon discussed the problems caused by the uncertainty surrounding the substantive law relating to a concerted practice, noting that the effectiveness of the law was dependent on its precision.

[83] *Ford* at pp 2728-2729 and *Vichy* at p 423. The decision in *Vichy* is a preliminary one and DGIV's final decision may shed more light on the matter. Also *IAZ* at pp 3393-3395, alleged that DGIV's interpretation of Art.4(2)/Reg.17 undermined legal certainty.

[84] See *Ford* at pp 2747-2748 and *Vichy* at p 424. The Court dismissed both submissions outright, as did the Court in *IAZ* at p 3413.

[85] Arnull in 'Owning Up to Fallability', discusses fully the confusion created by the Court's attitude to precedent. He notes that these problems are exacerbated by the Court's failure to provide for reasons for departures from precedent. Rasmussen in *On Law and Policy in the European Court of Justice* and 'Between Self Restraint and Activism', critically analyses the ECJ's judicial activism. This is also examined by Mancini 'The Making of a Constitution for Europe'. For critiques of Rasmussen's work, see Cappelletti 'Is the European Court of Justice "Running Wild" ?' and Weiler 'The Court of Justice on Trial'.

[86] Cruz Vilaca in 'The Court of First Instance', examines these issues in detail, arguing that their cumulative effect is to create disrespect for Community law. At pp 11-12, he notes that there is on average an 18 month delay in hearing Art.177 references. These problems are also discussed by Arnull 'Refurbishing the Judicial Architecture'.

[87] The scope of this principle is discussed by : Steiner *Textbook on EEC Law* at pp 49-51 ; Wyatt and Dashwood *The Substantive Law of the EEC* at pp 91-95 ; Kerse *EC Antitrust Procedure* at paras 8.28-8.30. The principle was applied under Art.173 of the Treaty in *Topfer* [1978] ECR 1019. In that the principle involves the raising of a reasonable expectation, reliance on that expectation and breach of it, it is similar to the English legal principle of estoppel. For further discussion of this aspect, see McKenzie Stuart ' Legitimate Expectation and Estoppel'.

The principle is also discussed thoroughly by Sharpston 'Legitimate Expectations and Economic Reality'.

88 See McKenzie Stuart 'Legitimate Expectation and Estoppel' at p 53.

89 See *Hercules* at para 54 and 12th Report on Competition Policy 1982 at paras 34-35. Similar comments were made in *Cement* at p 251 and *Woodpulp II* at pp 458-461. See Ch4 supra under 'The Right to be Heard' for a more detailed discussion of this issue.

90 The Commission's most recent attempts to exclude in the name of confidentiality have occurred in *Cement*, *Soda Ash* and *PVC II*. In *Cement* at p 257, the Court held that limited access did not effect irreparable damage as the defendant may appeal against DGIV's decision. However, the CFI was sternly critical of DGIV's attitude to disclosure. As *Soda Ash* and *PVC II* are currently on appeal, the Court has further opportunity to make clear to the Commission its responsibilities. For more detailed discussion on this issue, see Ch4 supra under 'The Right to be Heard'.

91 *VBBB* at p 60. The Commission declared its intention to hold a sector inquiry on several occasions including in response to written question in the European Parliament. See, WQ No 514/81 OJ [1981] C240/20 and WQ No 514/28 OJ [1981] C273/185.

92 *AEG* also highlighted the paramouncy of Reg.17, claiming that its legitimate expectations had been infringed by DGIV's prosecution of its distribution system. Here, AEG had previously received a comfort letter and no action had been taken over prior to complaints of discriminatory practice by *AEG*. Thus, the firm claimed it was entitled to assume that the selective distribution system was legal. The Court at p 3191, held that the Commission's previous inaction or slackness in enforcement could not raise a legitimate expectation and could not justify AEG's infringement of competition rules. See similar claims by *SSI* and *Van Landewyck* appealed under breach of the principle of equality, discussed earlier in this chapter.

93 *Distillers* at pp 2262-2263. The Court made it clear that completion of Form A/B must be observed to the letter as a pre-condition for exemption.

94 *IAZ* at pp 3387, 3395, 3409, 3414-3418.

95 A number of firms involved in the *Polypropylene* cartel made this claim, particularly *Hercules* at pp 323-325, *Hoechst* [1992] ECR 629 at p 656 and *Huls* [1992] ECR 499 at p 528. For the CFI's response in *Polypropylene*, see consideration of the principle of equality discussed earlier in this chapter. *Welded Steel* is currently on appeal on this ground. Discussed by Kerse *EC Antitrust Procedure* at para 8.30.

96 See Art.2(3)/Reg.2988/74, which fixes limitation periods in competition cases. This regulation is discussed by Kerse *EC Antitrust Procedure* at para 8.47. See also *Dyestuffs* [1972] CMLR 557 at para 49 ; *Commercial Solvents* [1974] 1 CMLR 309. In addition, where time does not bar DGIV from proceeding, the principle of estoppel may come into play. This aspect is evaluated by McKenzie Stuart 'Legitimate Expectation and Estoppel'.

97 See discussion in Ch6 and Ch8 supra, regarding the duration of fines for further details of the Commission's case construction.

98 See earlier discussion of appeals by *PVC*, *Polypropylene*, *LdPE*, *Zinc Producers*, *Welded Steel*, *Cast Iron Rolls* and *Cement* in Chs 4, 6 supra.

99 Van Bael 'Transparency of EC Commission Procedings' at p 193, has referred to this as the Court's "so-what" doctrine. Both he and Coppel in 'Curbing the Ruling Passion', have been trenchantly critical of this attitude.

100 Rasmussen 'Between Self Restraint and Activism' at pp 30-32. He also asserts that the ECJ's approach has resulted in a widespread perception that the Court is no longer a fully "trustworthy neutral". Rasmussen's work itself has been roundly criticised. See Weiler 'The Court of Justice on Trial' and Cappelletti 'Is the European Court of Justice "Running Wild" ?'.

101 Cruz Vilaca 'The Court of First Instance' at pp 12-17 particularly, discusses the threat posed to Community law by these problems. However, at p 54, he concludes that the introduction of the CFI has re-inforced the "rule of law" by providing increased judicial protection for individual rights. Coppel in 'Curbing the Ruling Passion'; Arnull 'Refurbishing the Judicial Architecture' and Due 'The Court of First Instance', also examine these problems

[102] Dauses in 'The Protection of Fundamental Rights' and Schwarze in 'Protection of Human Rights', disagree. Both feel that the ECJ has done much to uphold fundamental rights. Dauses at p 419, insists that the fact that the Court find few infringements of fundamental principles indicates the healthy state of Community law.

[103] Coppel in 'Curbing the Ruling Passion' at pp 143-144, has expressed concern over the Court's refusal to recognise procedural integrity as a value in itself.

[104] Goyder 'User Friendly Competition Law' at p 3 and Wood 'User Friendly Competition Law in the United States' at p 10.

[105] See Goyder 'User Friendly Competition Law' at p 3 and Wood 'User Friendly Competition Law in the United States' at pp 14-15.

[106] For further discussion, see Wood 'User Friendly Competition Law in the United States' at pp 10-14 and Goyder 'User Friendly Competition Law' at pp 3-4.

[107] See Goyder 'User Friendly Competition Law' at pp 4-5 and Wood 'User Friendly Competition Law in the United States' at pp 16-17.

CHAPTER TEN

ANTITRUST IN AMERICA

"America has been discovered before, but
it has always been hushed up." [1]

A)INTRODUCTION

To add further depth to this examination of antitrust enforcement, the following chapter will undertake a comparative evaluation of competition law enforcement in the US [2]. Limitations of space only allow for a broad overview of procedure in this jurisdiction. Thus, the study will concentrate on examining the central issue of the classification of anti-competitive conduct in the US and its nexus with the scope and application of enforcement powers and the ambit of defence rights. The analysis will undertake some evaluation of whether and how the law is used as a resource to achieve policy goals. Special consideration will be given to the existence, scope and effect of political and pragmatic objectives in this context. So, as with the EC, the ensuing discussion is not a comprehensive account of antitrust in this jurisdiction. Instead, in order to explore fully the hypothesis of the study, it will concentrate on evidence indicating the US jurisdiction's use of the 'law as a resource' and the impact of political and pragmatic goals [3]. In this way, the study will provide some indication of whether the Commmission's conduct and the problems resulting from it are typical of antitrust enforcement in general, revealing the prevailing policy reasons for this. By shedding light on the true nature of antitrust, the research should provide some answers to the question of justiciability and thus the most appropriate type of market control.

The principal US antitrust statutes are the Sherman Act 1890 (ShA) and the Federal Trade Commission Act 1914 (FTC Act). Whilst other antitrust provisions exist, the enforcement approach under these central Acts is so typical of US antitrust enforcement that no further reference will be made to other statutes unless specific differences of approach require it. The following sections will broadly outline the US

enforcement process, noting the nature and scope of enforcement powers and defence rights and providing some consideration of whether and how these powers and rights are used as enforcement resources [4].

B)ENFORCEMENT PROCESS - INVESTIGATION [5]

1)Department of Justice (DOJ) Investigations

The DOJ's detection of antitrust offences derives from a variety of leads. Its main sources are disgruntled employees, dissatisfied consumers and witnesses from other investigations [6]. Interestingly, the DOJ does not rely on the Economic Analysis Group (EAG) for leads on antitrust offences [7]. Nor does the DOJ investigate purely on the basis of economic criteria [8]. As such, the Division has no set of economic tools to direct the use of its investigation powers.

The DOJ's position as the national law enforcement body gives the Antitrust Division extensive investigation powers. To assist the fact-finding process a number of guides have been issued over the years detailing powers and procedures and giving advice on the resolution of common problems [9]. The chief lines of investigation are outlined below.

a)Preliminary Investigations (PI)

The first fact-finding method is to seek information on a voluntary basis, either by correspondence or by sending out an Antitrust Division investigator to visit a firm's offices. This is done by a staff attorney within the Division requesting a PI following a complaint [10]. Should the lead be substantiated, further more formal investigations are likely to follow. Invariably, companies co-operate in order to avoid trouble later. Prior

to the passing of the Antitrust Improvements Act 1976, these voluntary investigations were much used [11].

b)Formal Investigation

Recent years have seen the DOJ take a tougher approach towards investigation. This has resulted in the increased use of a wide range of criminal investigation tools to uncover antitrust violations. The DOJ now makes frequent use of telephone monitoring, body wires and videotapes. Search warrants are also obtained where the Division suspects that evidence may be destroyed [12]. Phone tapping and body wires normally require the consent of the party concerned [13]. Such consents may form part of a bargain giving immunity from prosecution [14]. In non-consensual situations, normal criminal procedural rules apply and the DOJ must establish a 'reasonable belief' of an antitrust violation before taking further action [15].

c)FBI/Other Federal Agencies

The Division also makes use of the FBI in conducting investigations, particularly in connection with fingerprint and handwriting identification and the polygraphy of witnesses [16]. Over recent years, the DOJ has increased contact with other federal agencies with a view to both developing better means of detecting violations, and in order to take advantage of their investigation resources [17].

d)Grand Jury Investigations

The grand jury is the most powerful investigative tool available to the DOJ and is used routinely in the investigation of criminal antitrust infringements [18]. Grand juries possess considerable autonomy and can compel the production of documents, answers to interrogatories and testimony from witnesses. The grand jury's activities are only limited by a duty not to impose an unreasonable burden on witnesses [19]. During the

first stage of a grand jury investigation, the DOJ issues broad subpeonas, in the grand jury's name, for documents [20]. The Division then negotiates with the firm over the terms of the subpoena and the scope of the search. Once the demanded documents have been obtained, the hearing before the grand jury takes place. Here, the DOJ uses the subpoenaed documents to examine witnesses and establish the crucial facts of the case. It should be noted that, whilst the DOJ may negotiate the terms of the initial subpoena, witnesses called before the grand jury have no actual right of advance notice of the nature and scope of the violation under investigation [21]. During the course of the hearing, the Division is not only able to establish the basis for an indictment, but it also obtains extensive discovery of documents and is able to refine its case [22]. However, grand juries cannot compel witnesses to incriminate themselves [23]. In the event of refusal, the DOJ may obtain a 'use immunity' order from the Court compelling the party to give evidence [24]. Under these orders, witnesses cannot be prosecuted on the basis of the compelled testimony or other information obtained as a result of the order [25]. Naturally, use immunity is not generally granted to prime offenders as this deprives the DOJ of potential defendants [26]. In practice, this process is highly adversarial. Suspected individuals are 'played off' against each other, with the counsel of each party attempting to convince the DOJ that their client is either innocent or has been so co-operative to the prosecution, that immunity is justified [27].

Grand juries hearings are closed ex parte proceedings [28]. Neither counsel for the defendant nor witnesses has a right of audience. Indeed, the hearing is conducted without a judge or other 'neutral' party to supervise proceedings. Thus, the grand jury is very much under the prosecution's control and only the goverment's case is heard [29]. Moreover, the result of the proceedings is kept secret [30].

The Division's use of grand jury investigation has come under considerable criticism for several reasons. First, it is argued that the criminal procedure is inappropriate for such matters. The secret, ex parte nature of the hearing has also caused concern. The outcome of such investigations is invariably indictment, yet the defence is given no opportunity to explain its actions [31]. Finally, there are allegations that the DOJ uses grand jury investigations as 'fishing trips' to obtain sufficient

information upon which to base civil actions. This tactic both places a financial burden on firms and tarnishes their reputation unnecessarily [32]. Indeed, Baker describes the grand jury as no more than "a vacuum cleaner for finding Goverment evidence" [33]. However, despite the Supreme Court holding that grand jury proceedings should not be used where the Division only intends civil action, there has been no apparent reduction in their use [34].

e)Civil Investigation Demand (CID)

The CID is an additional method of discovery which is used to determine whether there is sufficient evidence to warrant filing a civil antitrust complaint [35]. These demands provide the DOJ with extensive powers to compel individuals and corporations alike to testify on oath on interrogatories and depositions and to provide documents relevant to the investigation [36]. Some control is placed on the exercise of this power. In issuing a demand, the DOJ must establish a reasonable belief that the person under investigation is in possession of relevant documentary material and it must identify the required documents with reasonable precision [37]. However, the DOJ cannot use a CID to compel disclosure of privileged material [38].

2)Federal Trade Commission (FTC) Investigations [39]

The FTC has equally broad powers of investigation. It can compel the production of documents and the sworn testimony of witnesses [40]. In the course of investigations, the FTC may obtain use immunity orders compelling tesimony under the same rules that apply to DOJ investigations [41]. The Commission can also order the filing under oath of annual or special reports or answers to specific questions [42]. The Special Report procedure is often invoked to enable a rapid industry-wide investigation [43]. The only control placed upon the Commission's investigation is a procedural requirement that the purpose and scope of the investigation must be disclosed to those persons requested or compelled to provide information or documents [44].

3)Overlapping Jurisdiction

As the US has two federal enforcement agencies, their jurisdictions tend to coincide considerably. Allocation of overlapping responsibilities is handled by DOJ and FTC liason officers. In the past, certain industries have been informally allocated on the basis of the relevant expertise of respective agencies [45]. Thus, the DOJ investigated the banking, brewing and computer industries, whilst the FTC handled the milk and food industries and distribution practices [46]. However, Hawk and Veltrop report that these lines appear to be blurring, with many investigations being assigned on the basis of informal bartering rather than as a result of rational policy decisions [47]. The overlap of jurisdictions has attracted some criticism. Although advocates argue that the overlap promotes 'competition' between the agencies, and thus encourages effective enforcement, many others complain that it merely fosters inefficiency and inconsistency [48].

C)DEFENCE RIGHTS - INVESTIGATION

1)Right to Silence

As already noted, the defendant has a constitutional right to silence [49]. However, some limitations are placed upon its scope. First, the privilege only applies to individuals not corporations [50]. Moreover, the right only applies in respect of criminal charges and penalties. Thus, individuals may not claim this right in order to avoid exposing themselves to liability in a civil action [51]. The value of this protection is also limited by the prosecution's ability to obtain use immunity orders compelling testimony. Although parties are immune from prosecution on the basis of their own evidence, unless their testimony is wide-ranging, defendants could face prosecution on a related antitrust offence where the prosecution has obtained information from other sources [52].

The frequent resort to immunity orders means that the right to silence rarely hinders the prosecution's acquisition of evidence. But, as a result, defendants are placed at risk of implicating themselves in further violations [53]. In addition, both the DOJ and FTC have extensive powers to punish all forms of non-cooperation. Under FTC rules, refusals to give evidence or produce documents, the giving of false or misleading evidence and the destruction or alteration of documents are all criminal offences punishable by a fine or imprisonment [54]. Furthermore, the FTC may impose daily penalties where special or annual reports are not submitted within a specific time limit [55]. The DOJ has similar provisions [56]. Moreover, perjury in legal proceedings or before a grand jury is a criminal offence risking stiff penalties [57]. McAnneny states that it is DOJ policy to treat all forms of non-cooperation as serious criminal matters and to prosecute them with vigour [58]. Finally, where parties fail to comply with a CID, the DOJ may obtain a court order requiring compliance. Refusal to do so is punishable as contempt of court [59].

2)Confidentiality [60]

As with the evaluation of EC rules, the defence right of confidentiality at investigation will be considered in the context of the protection afforded by legal professional privilege.

In the US, legal professional privilege is clearly recognised. A distinction is drawn here between 'attorney-client' privilege which covers the giving of legal advice at any time and 'work-product doctrine' which ensures confidentiality for the processes by which a lawyer develops and prepares his case for trial [61]. In US law, only 'attorney-client' privilege is the right of the client [62]. Several limitations are placed upon its scope. In common with most jurisdictions, the US will not grant protection to communications made in contemplation of some wrong-doing [63]. US courts are also prepared to disallow privilege where other "substantial abuses" of the safeguard have occurred [64]. Moreover, it has been the concerted policy of the federal courts to make clear that full disclosure is of greater importance to the needs of justice than the

protection of legal professional privilege and thus the safeguard will always be construed restrictively [65].

Finally, under the ShA the full weight of the criminal law may be applied to acquire documents or compel testimony. In particular, the prosecution is able to obtain use immunity orders to circumvent claims of privilege [66].

D)CONCLUSION - INVESTIGATION

This examination reveals that the DOJ possesses a formidable array of investigation tools which are patently criminal in character. The fact that the Division has the full range of criminal enforcement powers, combined with the assistance of other federal agencies at its disposal, means that it has no problem in acquiring sufficient evidence with which to mount a prosecution. The fact the DOJ's antitrust enforcement forms part of the normal criminal process does mean that some procedural controls are placed on the exercise of its powers. But, in the face of the DOJ's extensive authority, the effectiveness of these controls may be reduced. Certainly, there is no evidence suggesting that they curtail the prosecution's acquisition of evidence in any way. The Division's civil powers are no less formidable. Its ability to compel sworn testimony and the production of documents under the CID procedure is entirely penal in nature. The increase in the range and use of investigation tools employed, particularly the routine resort to grand juries, indicates the Department's intention to construe and apply its powers penally in pursuit of antitrust enforcement.

The grand jury may be the Division's most powerful and penal resource, but it is also its most controversial. Whilst the grand jury originated as a means of preventing abusive prosecutions, it has more recently been likened to the Star Chamber [67]. It is certainly a process geared to prosecution and ultimately conviction. Its secret, ex parte nature denies the defendant the opportunity to comment and provide the jury with a balanced view of the case. In the absence of neutral

supervision, the proceedings are left entirely in the prosecution's control. This situation not only allows the Division to cast its evidential net wide, but it also makes indictment inevitable. The nature of the process means that no control exists to audit either outcome. The grand jury's decision is necessarily based on partisan evidence, yet it may have long-term consequences, setting in motion the prosecution momentum and thus significantly improving conviction prospects.

Although only an administrative agency, the FTC possesses equally extensive investigation powers. Its ability to compel sworn testimony, the production of documents and written answers to specific questions, combined with routine use of these measures, indicates that its fact-finding powers are criminal in character, scope and application. However, the Commission's penal powers are balanced only by broad procedural controls. As such, these requirements neither hinder the FTC's fact-finding, nor are they able to exert exacting control over possible abuse of these investigation powers.

Both the DOJ's and FTC's investigation powers are supported by formidable sanctions for non-cooperation. Specifically, the threat of custodial sentences ensures the prosecution's investigation demands are met with regularity and alacrity. In the face of such penalties, it is no wonder that US firms are fabled for their deference to antitrust rules. The scope of the sanctions and the prosecution's willingness to penalise non-cooperation discloses the United States' determination to pursue an overtly penal antitrust policy.

To balance the prosecution's penal approach, defendants are accorded substantive protections. At investigation, unequivocal rights to silence and confidentiality exist. But, the pressures placed upon them in antitrust cases may limit their practical value. So, although the right to silence is a famous Constitutional guarantee, both agencies are able to override this safeguard by obtaining use immunity orders. Whilst these orders theoretically protect witnesses, sometimes, they may pose more of a threat than a safeguard. Unless defendants are particularly expansive in their evidence, they could find themselves subject to prosecution for a related violation. They may also find themselves exposed to an equally damaging civil action. Clearly,

the protection afforded under these orders may be limited and temporary in nature. In return for such protection, the prosecution gains considerable advantage. The adversarial nature of the bargaining surrounding immunity orders allows the prosecutor to use this process to pit defendants against each other. In the course of these negotiations, defendants may reveal additional information and consent to telephone monitoring or body wires in order to promote their cause. This manipulation of the process is of clear advantage to the prosecution allowing the acquisition of evidence at no extra cost to the prosecution. The frequent use of these orders to compel testimony ensures that the defendant's right to silence does not hinder prosecution fact-finding. Indeed, continued insistence upon one's constitutional rights is met with criminal sanctions. This places defendants in a dilemma. Insistence upon one's rights may be rewarded with a custodial sentence ; compliance with an immunity order may result in prosecution and similar consequences or civil action awarding treble damages. Ultimately, the prosecution's control of the process may leave defendants with little option but to acquiesce to prosecution demands, so reducing the effectiveness of this safeguard.

Legal professional privilege meets a similar fate. Whilst at the outset the protection is recognised, the prosecution's ability to compel the production of documents under immunity orders means that this safeguard may offer little real protection. By interpreting this privilege restrictively, the judiciary have made it clear where their sympathies lie. For US courts, effective enforcement is more important than defence rights.

Already at investigation stage, the same pattern seen in the EC context is repeated here. Again, the prosecution is very much in control of enforcement. The DOJ's and FTC's investigation powers, whether nominally 'criminal' or 'administrative', are clearly penal in character, scope and application. Admittedly, US defendants are in a stronger position, possessing substantive criminal safeguards. But, even these can be curtailed to some extent. This section has illustrated that the prosecution's mastery of the process enables them to override these safeguards as and when enforcement demands. Moreover, such tactics are used to the same effect. By facilitating certain

and cost-effective enforcement, they serve both the political and pragmatic goals of US antitrust.

E)PROSECUTION [68]

After investigation, both the DOJ and the FTC must decide whether and how to prosecute. For the DOJ, part of this assessment involves deciding whether to mount criminal or civil proceedings or both. The following sections will examine the factors affecting this exercise of discretion, including any formal guidance provided. As DOJ and FTC decision-making at prosecution is similar, they will be dealt with together.

1)The Decision To Prosecute

a)Procedure

The ShA places the DOJ under a duty to proceed against suspected violations [69]. Normal litigation procedure applies to both the Division's criminal and civil actions [70]. Where indictment is envisaged, the draft indictment and a detailed statement of the evidence is forwarded to the Asst. AG for review. Defence counsel are permitted to participate in this review [71]. Convsequently, they are able to negotiate with the prosecution over whether, how and whom to prosecute [72]. Following review, the Asst. AG decides which individuals and firms to prosecute. The draft indictment is then placed before the grand jury who invariably vote in its favour [73].

In contrast, the FTC exercises a statutory discretion to prosecute [74]. This decision is taken by the Commissioners themselves not the Bureau of Competition. Defence counsel have a similar opportunity here to influence prosecution decisions [75].

Once action has been decided upon, the FTC issues a formal complaint giving details of the charges and fixing a date for the hearing [76].

b)Prosecutorial Guidance

i)General Policy Goals [77]

The shifting focus of general antitrust policy has had a direct impact on prosecutorial decision-making. Brennan discusses the effect of this on the recent evolution of prosecution policy, examining the legal, academic and political influences on prosecution and how they have affected the exercise of prosecutorial discretion over the last 30 years [78]. He concludes that since the Reagan Administration of the 1980s there has been increasingly strong political involvement in prosecutorial decision-making. Cases are no longer prosecuted on merit but on the basis of political desirability [79]. This political influence has manifested itself in recent Administrations, producing significant changes in prosecution policy particularly in relation to certain offences [80].

Whilst the Reagan Administration was trenchantly criticised for its over-lenient prosecution policy and its refusal to take action against many traditional offences, it nevertheless increased the number of criminal prosecutions for price-fixing and bid-rigging violations [81]. The Bush Administration undertook a tougher, more active prosecution policy covering a wider range of offences [82]. Nelson notes that whilst the focus of Bush antitrust enforcement remained on price-fixing and mergers, there was an increased willingness to prosecute rpm cases and the restrictive practices of professional associations [83]. There are also indications that political goals have impacted upon evaluation lowering the prosecution standard and making prosecution more likely [84]. This increase in the frequency and range of prosecution is also evidenced in a survey of antitrust lawyers carried out by Nelson [85]. However, these lawyers expressed concern over the frequently inconsistent prosecutorial decision-making of both the DOJ and FTC [86]. The Clinton Administration has continued to

pursue a more aggressive prosecution policy, the central focus remaining of the prosecution of criminal per se violations[87].

Thus, it is clear that the political goals of the current Administration are a potent influence on the exercise of prosecutorial decision-making, dictating both whether and how cases will be prosecuted.

ii) Guidelines

Other sources of prosecuturial guidance are contained in various guidelines issued by the respective agencies. The most relevant here are the *Vertical Restraints Guidelines* which took a very lenient approach to assessing the legality of most vertical restraints[88]. As these guidelines have been strongly criticised and were not adopted by the FTC or the federal judiciary, it is not intended to discuss their contents further[89].

In addition, both the DOJ and FTC are issued with procedural manuals detailing giving advice on all aspects of enforcement[90].

c)Choice of Proceedings

As well as the DOJ deciding whether to prosecute, it must decide whether to institute criminal or civil proceedings. In making this choice, the Division must identify what it hopes to achieve by the action. Criminal sanctions can only punish past offences. Moreover, there is some concern that criminal sanctions are inappropriate for such regulatory offences, particularly in borderline situations[91]. Furthermore, in some types of offences criminal punishment is ineffective[92]. Invariably, the Division considers that competition can be maintained better by regulating future conduct within a market. Such regulation can only be obtained in civil proceedings. Thus, many major antitrust cases are civil ones. But, where there are flagrant, repeated breaches of antitrust laws, then prosecution is regarded as more appropriate[93]. Present policy focuses criminal enforcement on unambiguously anti-competitive practices such as price-fixing, market division and bid-rigging[94].

The Division has adopted specific criteria which it uses to decide whether to proceed criminally. First, there must be a clear agreement between competitors where

the effect is to raise prices and reduce output without any prospect of pro-competitive advantage. The conduct must be fraudulent and covert and the offenders must have intended to enter into a per se illegal agreement [95]. The Division's internal rules suggest that where it has solid evidence of illegal conduct, it will prosecute regardless of the volume of trade involved [96]. These criteria do not bind the Department. On occasion, it has pursued prosecution where the evidence has been weak or circumstantial, but there have been overriding policy requirements [97]. As might be expected, the political influences discussed above have had a noticeable effect on the DOJ's choice of proceedings [98]. Consequently, in the last 15 years the number of criminal antitrust prosecutions per annum has more than doubled [99]. Of course, where the situation is both a blatant breach and displays the need for future regulation, the Department can proceed with concurrent criminal and civil actions.

2)Case Construction

Limitations of space do not allow a full discussion of the ambit of the substantive law in the US. At this point, it is sufficient to note that the provisions of both the ShA and FTC Act are sufficiently wide to allow prosecutors to undertake the same type of case construction as seen in the EC context, bringing most conduct within their purview. Further discussion of how the substantive law can be manipulated in order to secure convictions will be undertaken at trial stage when the per se/rule of reason analytical format is examined [100].

F)DEFENCE RIGHTS - PROSECUTION[101]

1)Right to Access

The ambit of this safeguard in both DOJ and FTC actions will be considered here, noting whether the requirements of confidentiality serve to limit its scope and effectiveness.

Generally, the US favours broad disclosure to defendants/respondents involved in antitrust cases of all relevant materials obtained by the agency during investigation [102]. Some variation does exist between agencies. As enforcement proceedings arise in a 'true' litigation setting, discovery is governed by the normal procedural rules. The basic provisions are outlined below[103].

a)Discovery in DOJ Cases

Disclosure in DOJ civil cases is governed by the Federal Rules of Civil Procedure. In particular, Rule 26 provides for "discovery of any matter, not privileged, which is relevant to the subject matter in the pending action". It is immaterial here that some of the evidence may be inadmissible or useless to the defendant ; discovery is still permitted[104]. The extreme width of this provision allows for the discovery of a wide range of materials and will include investigation files, though discovery of these is limited by the 'work product' doctrine[105]. Other procedural rules permit the exchange of interrogatories, document demands and requests of admissions. This further extends the defendant's access to information and increases his ability to mount an effective defence[106].

In DOJ criminal cases, discovery is more limited. This is principally because of the stricter rules governing the confidentiality of documents[107]. However, defendants are able to discover a range of materials, including grand jury testimonies, under Rules 6 and 16[108]. In addition, prosecutors must disclose all exculpatory material.

Spratling notes that what may be classed as exculpatory is subject to interpretation and how this is applied may serve to limit the defendant's access to relevant material [109]. The defendant's right of access in criminal cases has been the subject of some debate and development. Given the complex nature of proceedings and the range of potential sanctions, courts have tended to interpret the rules to permit broader discovery [110].

b)Discovery in FTC Cases

The defendant's right of access under FTC rules is broadly similar to those in DOJ civil cases [111]. Disclosure in FTC cases generally requires the approval of an Administrative Law Judge (ALJ) [112]. ALJs may approve the inspection of documents and access to information regarding the existence and location of documents and the identity of parties who may be in possession of useful information [113]. Occasionally, parties are allowed access to special reports filed under s.6 FTC Act [114].

c)Limitations on Access

In both civil and criminal cases, access rights are subject to certain limitations. As the situation in DOJ and FTC is similar, they will be dealt with together.

i)Confidential Materials

Usually access to documents submitted to the DOJ/FTC by third parties is limited to the respondent's counsel [115]. It has become common practice for third parties to seek protective orders covering all information submitted by them. These orders provide that the submitter will receive notice and the opportunity to obtain *in camera* treatment of the documents before litigation commences [116]. In order to obtain such status, submitters must establish that disclosure would result in "clearly defined and serious injury" [117].

In criminal litigation, the other principal limitation on discovery is that of 'informer privilege' [118]. The importance of protecting the identity of informers has been

a long standing policy consideration of the criminal law in general, and has been held applicable in antitrust cases [119]. The privilege afforded here is only a qualified one and it is within the judge's discretion to waive the privilege and allow the defendant access to the information [120]. No clear test for deciding this issue exists. Rather, it is done on an individual case basis with the judge taking into account the importance of the informer's testimony in relation to the nature of the violation and the possible defences available [121]. It seems that the issue will be decided on the basis of whether the defendant needs to know the informer's identity in order to be able to prepare an adequate defence [122].

ii)Legal Professional Privilege

'Attorney-client' privilege is one of the most fundamental limitations on disclosure, though it has only limited relevance where a defendant is seeking disclosure from a government agency [123]. The 'work-product' doctrine is more relevant and may give rise to both absolute and qualified immunity from discovery in all antitrust cases [124]. Documents containing the legal opinions and conclusions of agency lawyers are afforded absolute protection from disclosure [125]. All other documents prepared for litigation purposes by both federal agencies are given qualified protection [126]. This immunity may be lifted where the defendant is able to establish a substantial need for the material and that he cannot obtain such material from other sources [127].

iii)Expert Evidence

Access to expert opinion is also limited in all antitrust cases. Whilst parties to antitrust suits are required to disclose the identity of expert witnesses and a summary of the facts and the expert's opinion which will be relied on in court, reports of experts who will give evidence at trial are not generally discoverable, unless, the defendant is able to demonstrate a substantial need for access to the material [128]. Despite this, pre-trial orders often require the disclosure of reports by experts who will testify at trial [129].

d)Pre-Trial Orders

This is a standard procedure in both DOJ and FTC cases requiring an exchange of witness and document lists prior to trial. Information received under these pre-trial orders is in addition to general discovery rights and thus may nullify any limitations imposed upon access by the exceptions discussed above[130].

The effect of these orders is to provide defendants with detailed knowledge of the prosecution's case, largely removing the element of surprise. Combined with existing disclosure rights, the defendant at prosecution is able to acquire sufficient relevant data with which to formulate an effective defence.

G)CONCLUSION - PROSECUTION

In summary, prosecution powers are broad. The Division, although under a duty to enforce, still possesses a wide discretion over whether and how to prosecute. The FTC has a similarly broad discretion. The criteria guiding both agencies decision-making are broad and non-binding. Thus, they do not hamper the prosecution's choices. Even the more specific criteria controlling the DOJ's choice of proceedings permit room for manoeuvre and can be overridden by political and other extra-legal considerations. On occasion, prosecution has occurred where the criteria have militated against it, but criminal enforcement has been politically desirable. Nor is either agency's decision-making hampered by the provisions of the substantive law. Both the ShA and the FTC Act are drafted in sufficiently broad terms to allow both federal agencies to take action against conduct they wish to deter.

However, the basis of prosecutorial decision-making is cause for concern. The increasing influence that the political goals of the governing Administration exert over prosecutorial decision-making means that cases are not necessarily pursued on merit, but on the basis of political expediency, affecting both whether and how cases are

enforced. This political influence has caused prosecutorial discretion to be exercised increasingly in favour of criminal enforcement. Political factors have also been allowed to affect the prosecution's analysis of cases and to control legal and economic standards to enable politically desirable enforcement. These are clear examples of the manipulation of the law for political objectives. However, the changing political persuasion of the governing Administration necessarily alters current perceptions of what is politically desirable, affecting the focus of enforcement policy. This ever-changing prosecution focus necessarily replaces legal certainty with inconsistency and confusion. Such a pattern neither promotes substantive soundness nor is 'user-friendly'. That antitrust rules can be so easily manipulated by political whim must undermine the credibility and legitimacy of antitrust and the agencies which enforce it [131].

Defendants at this stage in the process are in a much better position than their EC counterparts. The fact that US enforcement largely takes place in a 'true' litigation setting is of immense advantage to defendants in terms of the nature and scope of disclosure rights afforded. US proceedings take considerably more care in ensuring that there is an 'equality of arms' in the litigation process. Consequently, US antitrust defendants/respondents enjoy generally broad rights of access to a range of materials.

Some limitations are placed on disclosure rights and the potential does exist in these situations for the legal framework to be manipulated to the prosecution's advantage. For instance, what constitutes exculpatory evidence is subject to interpretation and therefore manipulation, providing the prosecution with the opportunity to withhold evidence. The 'work-product' doctrine may similarly be employed to withhold discovery of some material, particularly investigation records. Finally, the criteria for lifting immunity in cases of 'informer privilege' are vague and are decided upon an individual basis, thus inviting inconsistency.

But, these potential problems are balanced by some significant advantages to the defendant. These benefits largely derive from the litigation setting of US enforcement. Firstly, the requirement of pre-trial orders means that all prosecution evidence to be adduced at trial is revealed. This often nullifies the problems

encountered because of limitations on disclosure. The litigation setting also enables defendants to negotiate with the prosecution, particularly in indictment reviews, allowing defendants the opportunity to influence a range of prosecution decisions. Above all, the litigation context means that disclosure is a clear, substantive right. In the US, the nature and scope of this safeguard is not at the unfettered discretion of the enforcing body. Any disputes over the extent of discovery are decided upon by an independent arbiter, whether it be a federal court judge or an ALJ. All these factors serve to significantly reduce the prosecution's ability to control the quality and quantity of evidence available to defendants at prosecution stage. Accordingly, the US system offers significantly better protection to defendants than the EC.

So, whilst both agencies have extensive prosecution powers which are clearly criminal in extent and application, defence safeguards are also considerable. Defendants both know the case to answer and are able to acquire sufficient information to make the right to comment effective. Thus at prosecution, there is significantly more parity between prosecution and defence positions than seen in the EC [132]. The impact of political and pragmatic goals remains consistent. Political objectives are a dominant factor in prosecution decisions. Pragmatic influences are particularly evident in the bargaining at indictment reviews. Together they promote the cost-effective and politically acceptable enforcement of antitrust rules.

H)TRIAL AND SENTENCE

In this final stage of the US process, the procedure for proving antitrust offences will be examined, noting how the requirements of proof may be manipulated to assist enforcement. The nature, range and application of sanctions available will also be discussed. Opportunities for the informal resolution of US antitrust cases will then be evaluated. Finally, the nature and scope of defence rights in both formal and informal contexts will be assessed. Comments made in the following sections are equally

applicable to DOJ and FTC cases. Where differences exist, special mention will be made.

1)Procedure

a)DOJ cases

In all DOJ cases, the normal criminal and civil litigation procedures apply[133].

b)FTC cases

Following issuance of a complaint, an ALJ holds a substantive hearing, receiving evidence from both parties[134]. The ALJ then issues an 'initial decision' which comprises detailed factual findings and legal analysis. This decision can be appealed to the full Commission by either party who will review the evidence and issue a 'final decision'. The Commission's decision may accept, modify or reject the ALJ's findings and conclusions.

2)Analytical Approach

The intention here is to outline the US approach to the analysis of antitrust violations, briefly noting the main problems and criticisms. Special attention will be drawn to the hidden political content of this approach.

A central feature of US antitrust enforcement has been the development of the per se doctrine and the rule of reason approach as tools for the analysis of anti-competitive agreements. Under this format, the degree of analysis varies depending on the type of restraint under consideration. Basically, agreements whose object is plainly anti-competitive are classed as 'illegal per se' and without any economic analysis are prohibited[135]. Market division, price-fixing, group boycotts and tying arrangements

normally come within this category. Conversely, restraints which, although anti-competitive themselves, are merely ancillary to the main objective, which is not anti-competitive, must be assessed for the reasonableness under the rule of reason approach. Here, the nature, purpose and effect of the restraint are judged in their market context. In order to determine their legality, many vertical agreements are dealt with under this rule [136]. In recent decades, there has been acrimonious debate over which factors should inform this evaluation. For most of this century a whole range of legal, political, economic and social issues were considered. However, the development of the Chicago school of economics has had a profound impact on US antitrust analysis, by arguing that traditional values are irrelevant or even harmful. Instead, it insists that economic efficiency should be the exclusive control in determining anti-competitiveness [137]. There has been considerable criticism of Chicago's exclusive focus on efficiency and fears of a hidden political agenda [138]. Fox, particularly, argues that this restricted focus on efficiency reflects a political philosophy which wishes to sideline antitrust enforcement and set big business free [139].

Whilst the distinction between the per se and rule of reason approach is of central important to US antitrust, problems do exist. The boundary between the two categories is not rigidly fixed and the rule of reason is difficult to define and apply as the concept embodies a standard which varies according to the constitution of the Court, the problems faced and the prevailing economic, political and social conditions [140]. The result is confusion and considerable legal uncertainty as, over time, the rules leave it unclear which practices fall into which category and by which criteria they will be evaluated [141]. Consequently, whilst the early years of antitrust saw the expansion of the per se doctrine because of its speed and cheapness of application, latterly, the Chicago perspective has reversed this trend. As a result, there has been much greater use of an increasingly economic rule of reason approach, even in traditionally per se situations, with a concomitant growth in legal uncertainty [142]. These permitted variations in the rule of reason standard have frequently resulted in the two categories conflicting with rather than complementing each other and have allowed patently anti-

competitive practices to be validated because of overriding political and social reasons[143].

3)Proof

This section will first examine the standards of proof required in US antitrust cases. It will then go on to broadly outline how the chosen analytical format affects the quality and quantity of evidence required to establish a violation thereby facilitating enforcement.

a)Burden and Standard of Proof

As US cases are heard in a litigation setting, normal evidential rules apply. Thus, in DOJ criminal cases, the Division bears the burden of proving its case beyond reasonable doubt[144]. In DOJ civil cases and FTC hearings, the federal agency bears the burden of proof under a "preponderance of evidence" standard[145].

b)Analytical Format

The choice of analytical format has a significant impact on the type and amount of evidence needed to substantiate a violation. In the US, horizontal violations are most frequently analysed under the per se approach. It will be recalled that under this format increased value is placed on circumstantial evidence with less emphasis on economic evidence and a lower standard of proof being required[146]. This approach makes it substantially easier for the prosecution to establish its case[147]. Consequently, in per se situations, the government is required to do no more than prove some form of agreement[148]. But, the reliability of this approach has been questioned. Given the amorphous nature of the concept of an agreement, there has been particular criticism of the Court's tendency to hinge the legality of the conduct on the existence of an agreement[149]. Burns asserts that the concept can be manipulated to conform with

current policy aims and is thus susceptible to political influence [150]. Moreover, the value of circumstantial evidence has been shown to be dubious, as it is susceptible to a range of interpretations [151]. Yet, such evidence has been regularly relied upon to prove major cartels [152]. The Supreme Court have justified this approach by stressing that findings are based on the cumulative weight of the evidence [153].

Clearly under the per se approach, the analytical format is able to boost evidential sufficiency enabling sometimes tenuous evidence to establish a violation. Such assistance is necessarily of profound benefit to prosecutors. Yet even with this substantial support, the FTC has suffered several recent reversals because of a failure to prove its case [154]. To exacerbate matters further, problems exist over the precise characterisation of horizontal violations. On occasion, this has resulted in some traditionally per se horizontal violations being subject to a rule of reason approach under which analysis and requirements of proof differ considerably [155]. Consequently, which format will be applied in a given instance is far from clear. Overall, these problems have resulted in significant legal uncertainty regarding both the characterisation of horizontal offences and what constitutes adequate proof of such violations [156].

Many vertical agreements are evaluated under a rule of reason approach [157]. Again, this analytical format has an impact on proof, requiring greater market evaluation and thus increased reliance on economic evidence under a higher standard of proof [158]. But, the reliability of economic evidence has been subject to criticism. Brunt asserts that the malleable nature of this evidence, particularly its ability to construct facts, calls into question its value [159]. Not only may the parties mould the evidence, but this market evaluation may be affected by the economic persuasion of the judge [160]. A further problem in the analysis and proof of vertical offences is the issue of what constitutes an agreement in the vertical context. As already discussed, the malleability of this concept has caused concern as it can be constructed to meet prevailing policy needs [161]. Moreover, critics argue that the existence of a vertical arrangement has no evidentiary value as it is equally indicative of pro- and anti-competitive effects [162]. What constitutes proof of a vertical agreement has been

particularly controversial in relation to vertical price restraints which are dealt with under a per se analytical format [163]. Since 1911, when *Dr. Miles* declared vertical price restraints per se illegal, the scope of a vertical agreement for antitrust purposes has been subject to various constructions by the Court revealing the confusion and ambivalence towards the competitive effect of vertical arrangements [164]. The first exception to the rule was imposed in *Colgate* which exempted unilaterally imposed price restraints [165]. Since then, the Supreme Court have addressed these issues on several occasions. Each time they have given a different definition of the concept and what constitutes acceptable proof [166]. Admittedly, each case has served to limit the *Colgate* doctrine and facilitate proof of a violation, but it has also sparked considerable controversy [167]. More recent cases have sought to clarify matters, but their attempts to tighten the standard for proving an illegal agreement have merely added to the confusion [168].

The Court's treatment of vertical restraints has been condemned as seriously undermining legal certainty. Their manipulation of the concept of an agreement means that it is impossible to easily ascertain where the division between a legal and illegal vertical arrangement lies [169]. The cases of *Monsanto* and *Sharp* add further ambiguity as they are internally conflicting and irreconcilable with each other. Not only are the boundaries of *Monsanto* unclear, but the decision causes evidential problems. Precisely what proof is required under this ruling lacks clarity and, in some instances, the evidential requirements for an illegal agreement are compatible with a legal unilateral agreement [170]. Moreover, the rule in *Sharp* conflicts with the rationale supporting the decision here, risking agreements which do not offend antitrust goals being caught as per se offences [171]. Furthermore, the rationale in *Sharp* conflicts with the decision in *Monsanto* [172]. The confusion over what constitutes an illegal vertical agreement and the evidential requirements supporting such a finding are exacerbated by the difficulties encountered in distinguishing between price and non-price restraints. Whilst the boundary between the two is blurred, the analytical approach, and thus the evidential requirements under each type, vary considerably [173]. Finally, many commentators have argued that the present distinction between price and non-price

restraints is economically insupportable in view of the considerable pro-competitive benefits attached to vertical arrangements and have called for a rule of reason approach to be adopted in all vertical cases [174].

It is clear that whichever analytical format is chosen, it has a major impact on the proof of an offence. Yet, which format will be applied to a given agreement and the nature and reliability of the evidential requirements under each approach have been the subject of wide-ranging debate. Of further concern is the inherent malleability of the Court's analytical approach and the concepts involved, ultimately leaving proof of an antitrust violation at the mercy of enforcement requirements.

4)Sanctioning Powers [175]

a)Civil Powers

In DOJ civil cases, the main remedy is the injunction [176]. The Court's powers in this respect are virtually unlimited. In practice, injunctions are extremely detailed and tailored to the specific needs of the situation [177]. These injunctions not only regulate the behaviour of the parties, but create a range of rights and duties affecting third parties. A typical example of the breadth of the Court's powers can be seen in *US v Paramount Pictures* which involved collusion between major producers and distributors of motion pictures [178]. On proof of a violation, the DOJ was able to obtain a decree regulating the working of the entire industry [179].

Quite clearly, the Division's civil sanctioning powers are extensive. Its ability to obtain and enforce such incisive control over business conduct is of immense value in the long-term regulation of competition [180].

The FTC's main sanctioning power is the 'cease and desist' order [181]. This consists of a series of detailed injunctions controlling future conduct. These orders have the force of law and violations of them can be fined up to $10,000 [182]. The Commission may also commence its own "action for compliance" with such an order,

following notification to the AG and may apply to the district court to give effect to the cease and desist order if it believes the order will be ignored [183].

Thus, the FTC too, is able to exercise long-term control over defendants [184]. But, its use of sanctioning powers has been criticised as excessive. Hobbs asserts that the FTC has placed too much emphasis on legal sanctions and not enough on securing voluntary compliance [185].

b)Criminal Powers

The Court's criminal sanctioning powers are extensive. Under the APPA, antitrust violations were upgraded from misdemeanours to felonies, following which, corporations could be fined up to $1m, individuals $100,000 and a maximum sentence of three years imprisonment could be imposed. Subsequent legislation has raised the level of fines even further [186]. Up to this point, the level of sanctions had been a matter of judicial discretion. However, in 1984, the US Sentencing Commission was established with the intention to ensuring consistency of sentencing [187]. In 1987, this Commission issued comprehensive mandatory Sentencing Guidelines establishing specific ranges of fines and imprisonment which must be imposed [188]. These were updated in 1991. Hence, the sanction now imposed depends on when the offence was committed as well as the nature and circumstances surrounding the violation and the characteristics of the offender [189].

i)1987 Guidelines

For violations committed under the 1987 Guidelines individuals may be may fined up to $250,000 ; unincorporated organisations $500,000 and corporations $1m [190]. Alternatively, a fine based on "twice the gain or twice the loss" may be imposed [191]. Under these Guidelines, the fine range for individuals is calculated on the basis of 4%-10% of the volume of commerce done by the defendant [192]. Prison sentences on individuals range from 0-18 months depending on various factors [193]. Under the 1987

Guidelines, fines on organisational defendants are calculated on the basis of 20%-50% of the volume of trade involved [194].

ii)1991 Guidelines

Under these Guidelines, individuals may be fined up to $350,000, unincorporated organisations $500,000 and corporations $10m [195]. These guidelines lowered the fine range for individuals, but increased imprisonment levels [196]. Sentencing of organisational defendants under the 1991 Guidelines differs considerably from 1987 approach. It is now significantly more complicated and depends on a range of factors relating to the seriousness of the offence and the culpability of the defendant which are added onto a 'base fine' calculated on 20% of the volume of commerce involved [197].

iii)Aggravating and Mitigating Factors

A range of such factors are taken into account in determining the level of individual and organisational sanctions. Most relevant for individuals are their role and extent of participation in the crime and the degree to which they personally profited from the violation [198]. In calculating the fine on organisations, the Guidelines take into account aggravating factors such as past record, the size of the firm, its attitude and whether high level management were involved in the offence [199]. In mitigation, the Guidelines taken into account the existence of compliance programmes and the co-operation of the defendant in investigating the violation [200].

In summary, the emphasis of these Guidelines is based on a 'just deserts' penal policy intent on achieving both individual and general deterrence of offenders [201]. In determining fines, the Guidelines aim to reward corporate efforts to prevent illegal conduct and any subsequent co-operation and to punish any obstructive behaviour particularly from high level management.

iv)Use of Sanctioning Powers

In the past, use of criminal sanctioning powers has been sparing, though the statistics do reveal a general increase in their use. In the first 65 years of the ShA, only twelve prison sentences were imposed and most of these were suspended [202]. In the following twenty years, 101 sentences or probationary periods were imposed. Again, many were

suspended[203]. Fines have been similarly limited with the maximum amount rarely being imposed[204].

This limited application of criminal sanctions has been criticised as reducing the deterrent value of antitrust laws. Blair asserts that whilst ample deterrent capability exists, it will not be effective until it is exercised frequently enough to instil fear into antitrust violators[205].

More recently, the Division has played an active role in emphasising the need for overtly deterrent sanctions. To this end, it has encouraged judges to impose stiffer sanctions and has lobbied for legislative increases in the severity of penalties[206]. This persistence has been rewarded, most recently, in the extensive financial and custodial sanctions permitted under the 1991 Guidelines[207]. The DOJ's overtly penal approach to antitrust violations is demonstrated by the statistics. Between 1981-1987, 993 defendants were indicted, during the course of which fines totalling $140m were levied. In addition, prison sentences were imposed on 212 defendants. The average sentence was 4-5 months[208].

5)Informal Resolutions

a)DOJ Cases[209]

i)Plea-Bargains/Nolo Contendere Pleas

In criminal proceedings, two related opportunities for a negotiated settlement exist. The defendant may either enter a plea of nolo contendere or may negotiate a plea-bargain.

A nolo plea is similar to a guilty plea, but has the advantage that it does not constitute an admission of guilt on any particular issue. No evidence is brought before the Court, thus protecting the company from having the Court's findings used against them in a private suit[210].

As already noted, sentencing discretion is limited by the Sentencing Guidelines. However, upon the request of the DOJ, the judge is able to depart from the normal

fine range where the defendant has substantially assisted government investigations. Thus, during plea-bargain negotiations, where the defendant provides information on the antitrust violations of other parties, a significantly lower fine may be imposed, giving the defendant a strong incentive to co-operate with enforcement [211].

Under the DOJ's current vigorous criminal enforcement policy, the Department tends to resist nolo pleas, preferring to insist on a guilty plea even in the context of a plea-bargain [212]. This policy is not always successful. Despite Division resistance, judges may accept a nolo plea in order to reduce their case lists.

ii)Consent Decree (CD) [213]

Most major civil DOJ cases are settled by CD following negotiation between the parties. There are several reasons for their popularity. Both parties are able to avoid protracted expensive litigation and, given the complexity of antitrust cases, this is an important advantage. There is an additional advantage for the defendant. Decrees are not admissions of guilt. No evidence is adduced in open court and decrees are not admissible in private suits. Thus, they afford defendants considerable protection [214]. CDs are governed by the APPA [215]. Once agreement is reached, the proposed decree must be published in the Federal Register, along with any materials the government "considered determinative in formulating" the decree and a "competitive impact statement" (CIS), 60 days before it becomes effective [216]. The CIS, prepared by the DOJ, must outline a range of issues setting the violation in its context and detailing the effect of the decree on competition [217]. Defendants must also disclose to the Court details of any contacts concerning the CD that it may have had with government departments other than the DOJ [218]. Not all defendants comply with this requirement, and where they do, they rarely admit contact [219].

The 60 day publication period gives third parties an opportunity to comment upon and obtain modification of the decree. In addition, various other methods are available to non-parties to influence the scope of the CD [220]. These avenues vary in their effectiveness, but occasionally decrees have been modified following third party comments [221]. Once this period has elapsed, the Court must decide whether the

CD is in the public interest. Specifically, they must assess the competitive impact of the decree [222]. To this end, the Court have a range of powers including the taking of testimony and the appointing of experts [223]. Generally, courts have been reluctant to become embroiled in active proceedings and invariably they simply affirm the decree [224].

Terms of CDs vary widely. They may range from simply prohibiting the offending conduct to imposing more detailed, wide-ranging requirements [225]. In negotiating decrees, the DOJ has considerable bargaining power. It can withdraw consent to a CD at any time before final judgement. This threat of a full trial allows the Division to exercise considerable leverage over defendants to co-operate on the Department's terms [226]. Previously, decrees did not contain expiry dates and often remained in force beyond any continued need [227]. Now, most decrees contain specific time limits. Many also contain other conditions such as reporting and inspection requirements [228]. Once an order is granted, its terms are binding on all parties and may be enforced through contempt proceedings.

This form of negotiated settlement is not without its problems. Public criticism that decrees failed to protect the public interest came to a head in 1971 with allegations of improper political pressure by ITT on the DOJ to settle a series of merger cases [229]. The Tunney Act was passed in the wake of this scandal and was intended to make the process more transparent and, in some unspecified way, augment the Court's role in guarding the public interest [230]. However, commentators are unanimous in finding that the APPA has had little appreciable procedural or substantive effect on decrees [231]. Despite attempts to curtail courts rubber-stamping decrees, most CDs are entered in the same terms as they were lodged [232]. Moreover, the APPA does not control the important area of negotiations between the DOJ and defendant where considerable pressure may be exerted to settle [233]. Nor has the APPA been effective in uncovering political and policy influences affecting the likelihood and scope of a decree [234]. Thus, the Act's success in combatting the very problems that brought about its existence seems limited.

The nub of the problem appears to be the unchanging judicial attitude towards decrees. Courts have always been loathe to interfere with terms acceptable to the parties involved and have preferred to simply affirm decrees rather than become embroiled in active proceedings. The APPA has had no impact whatsoever on this attitude [235]. The Court's public interest assessment is the cause of some concern and confusion. Firstly, courts have shown a marked reluctance to use the powers granted to them under the APPA to carry out this evaluation [236]. Some confusion has arisen over the powers granted to the Court. Kauper explains that Congress clearly thought it was providing the Court with a greater role, yet the Court already possesses the powers granted to them under the Act [237]. More pertinently, it is unclear how the courts can utilise these powers to make the required public interest evaluation without imposing the very costs on the parties that decrees are intended to avoid [238]. The Court's solution to these problems has been to proceed much as they did before the passing of the Act [239]. Despite these problems, Branfman asserts that the benefits of the APPA outweigh its disadvantages [240]. Certainly, the popularity of CDs as a means of informal resolution continues unabated [241].

iii)Business Review Letter (BRL) [242]

BRLs are similar to DGIV's comfort letters. Under this scheme, the Division reviews a proposed practice and states is enforcement intentions. Operation of this informal clearance procedure requires that the agreement is not in operation and full disclosure of the facts. After reviewing the material, the DOJ may state its enforcement intentions or may decline to comment. Usually, it is prepared to state its plans regarding criminal enforcement, but may reserve the right to institute civil proceedings [243]. Even where the Department waives immediate prosecution, it may withdraw the waiver where there has not been full disclosure [244]. The text of a BRL is normally published as guidance for other businesses. However, it must be remembered that a DOJ release under a BRL does not preclude private enforcement. There have been several instances where the Division has issued a BRL permitting practices which constitute antitrust violations and thus form the basis of potential private actions [245].

Informal resolutions are clearly important to the DOJ's enforcement policy. However, both the business and legal communities have criticised the lack of opportunities for informal settlement with the Division. A further drawback is that the Department's two favoured solutions, CDs and plea-bargains, both require the formal opening of litigation, and thus lack the informality desired by businesses. Nevertheless, in criminal cases, significantly reduced fines provide a strong incentive for defendants to seek some form of negotiated settlement. The Division's current zealous criminal enforcement policy may militate against further increases in non-adversarial resolutions, though the needs of pragmatism may serve to counteract this. An increase in the use of plea-bargains may provide the DOJ with the best of both worlds. In its civil enforcement the Division has relied heavily on settlement by CD, though the equity of some decrees has been questioned. Nevertheless, their popularity as a means of negotiated resolution is undeniable. Finally, of continuing concern is the amount of undisclosed political influence affecting the informal settlement of both the DOJ's civil and criminal matters.

b)FTC Cases[246]

The FTC's potential for informal resolution is more fully developed than the DOJ's. A number of possibilities exist.

i)Consent Orders

These are similar in form and content to the DOJ's CDs. Once a formal complaint is issued, the Commission negotiates with the firm concerned to reach a settlement. A consent order is then filed. Such orders are binding. Sometimes, the FTC enters negotiations prior to issuing a complaint. Once a settlement is reached, the complaint and the consent order are filed simultaneously. The Commission rarely uses this approach as it does not provide the FTC with the same leverage as it gains from the issuing of a formal complaint[247].

ii)Undertakings

In addition, the FTC may close its files without issuing a complaint where the offending firm gives written confirmation that the unfair practice has ceased and gives undertakings regarding its future conduct [248].

iii)Advisory Opinions

These are formal written statements issued by the Commission regarding the legality of a prospective practice [249]. Like BRLs, there must be full disclosure and the practice must not be in actual operation [250]. Whilst the opinion is published, it is not binding on the FTC [251]. Where the FTC revokes an opinion, it will not take further action until it has notified the affected party and given them an opportunity to discontinue the conduct [252]. Normally, opinions are only issued in matters involving important questions of law or public interest where no clear precedent exists [253]. Other enquiries may be dealt with by an informal 'staff opinion letter'. These are not binding.

iv)Industry Guides

These are administrative guides interpreting the Commission's view of the law on a particular subject relevant to that industry and indicating the factors that the FTC would take into account in making a decision [254]. These guidelines are not legally binding [255]. They are generally used where the Commission considers that the legal issues require clarification and it believes it can obtain greater voluntary compliance by articulating the agency's attitude [256].

v)Trade Regulations

These regulations are formal guidelines akin to delegated legislation [257]. Regulations may outline accepted practice within a specific industry or be of general application [258]. The FTC often uses breach of such regulations to establish unfair trading practices by a firm. Given the increasing need for antitrust regulation and enforcement, it is likely that in future the FTC will make even greater use of such regulations.

The Commission's use of informal resolutions has been subject to on-going criticism. Its choices over which cases to prosecute and which to negotiate have been questioned on grounds of fairness [259]. In the past, the Court did little to curtail the Commission's

selective prosecution policy. More recently, the Court have refused to defer to the FTC's discretion[260]. Moreover, the FTC's overwhelming preference for litigation over non-adversarial solutions in the last two decades has served to alienate much of the business and legal communities and has encouraged calls for its abolition. Despite these criticisms, Hobbs believes that there is a continuing role for the FTC in the development of non-adversarial processes which are cheap, fast and effective[261].

I)DEFENCE RIGHTS - TRIAL AND SENTENCE[262]

The defendant's right to comment and to an independent tribunal will be assessed in both formal and informal contents.

1)Formal Proceedings

As hearings of both DOJ and FTC cases are formal proceedings, full substantive rights to comment to an independent tribunal exist, providing a significant counter-balance to enforcement powers. Most notably, the independence of ALJs serves to safeguard defence rights, ensuring that decisions regarding such matters are taken by an independent arbiter. Some problems do exist. As noted earlier, the Court's political persuasion may affect the analysis of cases, thus jeopardising the independence of the deciding tribunal[263]. The FTC's monolithic role has been criticised criticised on similar grounds[264].

In criminal sanctioning decisions, the Sentencing Guidelines curtail the scope of arbitrary sanctioning by providing greater clarity in the calculation of sanctions. This provides additional protection for defendants.

Defendants derive further protection from rights of appeal operated through the normal court structure[265]. But, the scope of review is generally limited to issues of

law [266]. Particularly in appeals of FTC cases, the Court will concentrate on an evaluation of the standards and criteria employed [267]. The Court of Appeals do not indulge in a weighing of the evidence as often undertaken by the CFI. Whilst past supervision of FTC cases has been open to criticism, recent review has been more thorough [268]. Nevertheless, as it is often difficult to assess where the law ends and policy begins. This may mean that much of the FTC's decision-making escapes real scrutiny, so diminishing the effectiveness of appeal rights.

2)Informal Proceedings

As with informal settlement in the EC defence rights will be assessed here according to the legal protection they afford defendants. As DOJ CDs and plea-bargains and FTC consent orders all attract the same problems they will be dealt with together. Defendants negotiating such settlements may face difficulties. Whilst individual defendants may be able to exert strong political and economic power, little formal protection governs the bargaining process. Defendants have no right to withdraw from the proposed settlement and may possess little leverage to secure equitable terms. In this context, they may accede to terms considerably more stringent than necessary [269]. But, defendants are not at a complete disadvantage. They can express their concerns to judges in non-evidentiary hearings [270]. More importantly, such settlements are binding on all parties and are supervised by the Court. affording defendants considerable protection. This situation is in stark contrast to BRL's and the FTC's Advisory Opinions neither of which bind the agency involved. As such, these opinions provide the same dubious legal protection to defendants as EC comfort letters and for much the same reasons [271].

The central problem affecting all informal settlements is the underlying political influence on these solutions. This makes it difficult to assess the true degree of protection afforded. Changes in the political perspective of the agency involved could result in the withdrawal of any waiver not to prosecute. Moreover, they offer no

protection against highly damaging treble damages suits. Nevertheless, despite possible drawbacks, the popularity of negotiated settlements continues unabated.

J)CONCLUSION - TRIAL AND SENTENCE

It is now appropriate to assess the scope of prosecution powers and defence rights at trial stage, noting their value to the enforcement process. Unless otherwise stated, the comments below apply to both DOJ and FTC enforcement.

Again, at trial, prosecution powers are broad, placing them very much in control of the process. The choice of analytical format and the evidential requirements necessary to substantiate an offence in any given case are at the discretion of the prosecutor and Court. This has been the source of some concern. It has been demonstrated that whichever analytical approach is chosen, it has a significant impact on the proof of an offence. Yet, which format will be applied to a given situation and the nature and reliability of the evidential requirements under each approach have been the subject of continuing controversy. The overall impact has been to create wide-ranging legal uncertainty over the analysis and evidential needs of US antitrust cases. Of further concern, is the inherent flexibility of the selected analytical approach and the concepts involved which can be used to boost evidential sufficiency and permit, sometimes tenuous, circumstantial evidence to prove a violation. This is of significant enforcement assistance to prosecutors but clearly disadvantages defendants. Moreover, these choices have been shown to be particularly susceptible to undisclosed political influence. This malleability allows proof of an antitrust violation to be moulded to current enforcement needs. It also means that those open to the greatest sanctions are convicted on the least substantive evidence.

Both civil and criminal sanctioning powers are penal in nature and scope enabling the respective enforcement agencies to have long-term consequences upon the future business conduct of those they come into contact with. Over the years, the

application of these powers has become increasingly punitive. The current approach reveals a desire to impose maximum sanctions at every opportunity. This policy is in direct response to political requirements. Pragmatic needs also affect the use of sanctioning powers. For instance, the Sentencing Guidelines contain a clear mandate to reward co-operative behaviour which reduces enforcement costs.

Both federal agencies possess a range of opportunities for informal resolution. In both civil and criminal contexts, these allow wide-ranging penal conditions to be imposed on the defendants involved. However, the opportunity for, and use of, negotiated settlements has been criticised. Specifically, the government's current preference for adversarial resolution has militated against informal settlements in general. Moreover, enforcement agencies' preferred routes for negotiated resolution often possess a degree of formality disliked by businesses. This failure to utilise the full range of informal resolutions has resulted in a loss of corporate goodwill and represents many lost opportunities to encourage voluntary compliance. The political and pragmatic aspects of informal resolution require comment. Firstly, it has been revealed that political goals clearly affect the choice of informal resolution. Specifically, the DOJ's zealous enforcement policy shows a distinct preference for plea-bargains over nolo pleas. This choice allows it to exact greater advantage from the settlement and has significantly more penal consequences for defendants. Sometimes these political choices conflict with the Court's desire to accept a nolo plea in the interests of pragmatism, revealing an underlying tension between policy goals. Moreover, the likelihood and scope of a negotiated settlement may be the result of undisclosed political influence by both the prosecutor and the defence. Legislation intended to curb, or at least make explicit, this influence has largely failed to impact upon everyday practice. The pragmatic desire for speedy settlements has created the prevailing judicial tendency to affirm negotiated solutions without incisive consideration of the competitive impact of decrees or the influences informing settlements. Legislation intended to guide judges in this area has largely been ignored. Not least because the thorough evaluation demanded by statute conflicts directly with the pragmatic aims underlying negotiated resolution. Thus, once again, the underlying

tension between competing enforcement goals is highlighted. As it is unclear how these political and pragmatic conflicts will be resolved in any given case, the application and scope of informal resolutions remains uncertain.

At trial, defendants are in a strong position, possessing substantive rights to comment and to an independent tribunal whose scope is consistent with the nature of the procedure. Neither are at the discretion of the enforcing agency. In criminal cases, the Sentencing Guidelines further reduce the scope for capricious enforcement.

Whilst, defence rights in informal proceedings are less certain, US defendants remain in a stronger position than their EC counterparts. Admittedly, defendants in negotiated settlements are more susceptible to control by federal agencies. The absence of formal safeguards during bargaining means that the threat of expensive litigation and punitive sanctions can be used by prosecutors as leverage. But, the numerous practical advantages accruing to both sides from such resolutions serve to counteract potential difficulties, making negotiated settlements an extremely popular method of antitrust enforcement. So, whilst some disparity between prosecution powers and defence safeguards at trial stage still exists, it is notably less marked than in the EC,

Overall, the study illustrates the extensive penal scope and application of enforcement powers at trial stage. The entire process is geared towards acquiring and maintaining long-term regulation of US business conduct for political and pragmatic ends. Again, the political nature of antitrust causes concern. In both formal and informal situations, undisclosed political considerations continue to affect decision-making, threatening the legitimacy and credibilty of antitrust enforcement.

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1 Oscar Wilde.

2 On this, see also the earlier discussion of the comparative analysis in Ch1 supra.

3 For further on the central arguments of the study, see Ch1.

[4] For those unfamiliar with US antitrust legislation and its enforcement process, a brief description is contained in Appendix A. See also, L.Sullivan *Handbook of the Law of Antitrust* West Publishing Co (1977) ; Neale and Goyder *The Antitrust Laws of the USA* (3rd Edn) Cambridge Unv. Press (1980) ; Agnew *Competition Law* Allen and Unwin (1985) ; Whish *Competition Law* Butterworths (1993).

[5] Background information is derived from : L.Sullivan *Law of Antitrust* at p 751 et seq ; Neale and Goyder *The Antitrust Laws of the USA* Ch12 ; Agnew *Competition Law* ; Whish *Competition Law* ; Hawk and Veltrop 'Dual Antitrust Enforcement in the United States : Postive or Negative Lessons for the European Community' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 21; Baker 'Investigation and Proof of an Antitrust Violation in the United States : A Comparative Look' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 144 ; Hobbs 'Antitrust in the Next Decade - A Role for the FTC' *Antitrust Bulletin* [1986] 451 ; Johnson and Rupert 'An Introduction to US Antitrust Law' *LSG* [1986] 122-115, 126 ; Hawk *US, Common Market and International Antitrust : A Comparative Guide* Prentice Hall (1990) ; Fox 'The Modernisation of Antitrust : A New Equilibrium' *Cornell LR* [1980] 1140 ; Lingos 'Transparency of Proceedings at the United States Federal Trade Commission' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 203 ; Abraham *The Judicial Process* Oxford Unv. Press (1986) ; Kelly, Harrison and Betz *The American Constitution - Its Origins and Development* W.W.Norton & Co (1983) ; Fox and L.Sullivan 'Antitrust - Retrospective and Prospective : Where Are We Coming From ? Where Are We Going ?' *NYULRev* [1987a] 936 ; Kingdon 'Economic Argument in Antitrust Cases : An Americam Litigator's Perspective' *ECLR* [1987] 371 ; Davidow 'EEC Fact Finding Procedures in Competition Cases : An American Critique' *CMLR* [1977] 175 ; McAnneny 'The Justice Department's Crusade Against Price-Fixing - Initiative or Reaction' *Antitrust Bulletin* [1991] 521 ; ABA Antitrust Section *Handbook on Antitrust Grand Jury Investigations* (2nd Edn) (1988); ABA Antitrust Section *Criminal Litigation Manual* (1983).

[6] McAnneny 'The Justice Department's Crusade' at pp 529-530.

[7] The EAG is the Division's economic policy group.

[8] However, the Division has sometimes used economic profiles to assist detection. See discussion in McAnneny 'The Justice Department's Crusade' at p 531.

[9] Eg *Grand Jury Guidelines* BNA Trade Reg. Rept. (Oct 21, 1975). Discussed by Davidow 'EEC Fact Finding Procedures in Competition Cases' at pp 177-178.

[10] The Director of Operations grants the authority. For further information, see McAnneny 'The Justice Department's Crusade' at pp 531-532.

[11] Also known as the Hart-Scott-Rodino Act (HSR). This Act considerably expanded the DOJ's powers to obtain information mandatorily and discover documents. On this, see L.Sullivan *Law of Antitrust* at p 754 ; Davidow 'EEC Fact Finding Procedures in Competition Cases' at p 178.

[12] On this, see Judy Whalley (Asst.AG, Antitrust Division, DOJ) *Priorities and Practices - The Antitrust Division's Criminal Enforcemet Program Today* Remarks before the Bar of the City of New York on Per Se Antitrust Violations (April 8, 1988) at pp 4-6 ; McAnneny 'The Justice Department's Crusade' at p 528.

[13] Usually the informant. Wire fraud investigations allow phone tapping without the party's consent. Discussed by McAnneny 'The Justice Department's Crusade' at p 528.

[14] Under 18 USC s.6001-6003, the Division may seek 'use immunity' orders giving certain parties immunity from prosecution in situations where the parties are likely to claim 5th Amendment protection. On this, see Baker 'Investigation and Proof of an Antitrust Violation' at p 150 and McAnneny 'The Justice Department's Crusade' at p 532. Use immunity is discussed further under both 'Grand Jury Investigations' and 'The Right to Silence' infra.

[15] For further information on US criminal procedure, see Wright *Federal Practice and Procedure : Criminal* (2nd Edn) at s.350.

[16] See Whalley (Asst. AG, Antitrust Division, DOJ) *Priorities and Practices - The Antitrust Division's Criminal Enforcemet Program Today* Remarks before the Bar of the City of New York on Per Se Antitrust Violations (April 8, 1988) at pp 4-5.

17 McAnneny 'The Justice Department's Crusade' at p 529.

18 The powers and procedures before grand juries are discussed in : Baker 'Investigation and Proof of an Antitrust Violation' at p 150 ; L.Sullivan *Law of Antitrust* at p 755 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 376-377 ; McAnneny 'The Justice Department's Crusade' ; ABA Antitrust Section *Handbook on Antitrust Grand Jury Investigations* ; Abraham *The Judicial Process* at pp 105-111.

19 See Neale and Goyder *The Antitrust Laws of the USA* at p 376.

20 S.17(c) Federal Rules of Criminal Procedure (F.R.Cr.P.).

21 Discussed by Abraham *The Judicial Process* at pp 105-111.

22 See L.Sullivan *Law of Antitrust* at p 755. Usually, the DOJ begins by examining the lowest level individuals in a firm and works its way up. Research has shown that such parties are more likely to be truthful and that it is more difficult for them to conceal the facts. For further details, see Davidow 'EEC Fact Finding Procedures in Competition Cases' at pp 180-181 and Baker 'Investigation and Proof of an Antitrust Violation' at p 150.

23 Individuals subpoenaed may invoke 5th Amendment rights, but corporations may not : *Maricopa By-Products Inc v US* 1968 Trade Cas (CCH) (9th Circ 1967).

24 Under F.R.Cr.P. ss.6001-6003, the judge will issue such orders where in the prosecution's judgement : a)the testimony sought to be immunised may be "necessary to the public interest", and ; b)"such individual has refused to testify or is likely to refuse to testify on the basis of his constitutional rights".

25 Ss.6001-6003 F.R.Cr.P..

26 The prosecution of individual defendants is a major element of US antitrust largely because of its deterrent value. See discussion in Baker 'Investigation and Proof of an Antitrust Violation'.

27 Baker, a former Assistant Attorney General, Antitrust Division, in 'Investigation and Proof of an Antitrust Violation' at pp 150-151, notes that this process is nerve racking for clients and counsel alike.

28 Goverment lawyers, witnesses and jurors are the only parties permitted to be present.

29 On this, see Abraham *The Judicial Process* at p 105. The only parts of the defence case that are disclosed are those elements which the prosecutor chooses to reveal. See also, Neale and Goyder *The Antitrust Laws of the USA* at pp 376-377 ; L.Sullivan *Law of Antitrust* at p 755.

30 Rule 6(e) F.R.Cr.P.. Only the DOJ investigation staff, senior DOJ members and the defence (following indictment) are permitted to read the grand jury transcripts. Individual witnesses may, if they wish, disclose their testimony. but, they cannot be compelled to do so - except under the defendant's limited rights of discovery under the Federal Rules of Criminal Procedure. Discussed by McAnneny 'The Justice Department's Crusade' at pp 528-529 and L.Sullivan *Law of Antitrust* at p 755.

31 Indictment occurs in 95% of cases, see Abraham *The Judicial Process* at p 105. Even where no indictment follows, the criminal stigma attached to grand jury hearings may damage a firm's reputation. On these criticisms, see Neale and Goyder *The Antitrust Laws of the USA* at p 377 and Baker 'Investigation and Proof of an Antitrust Violation' at p 150.

32 Neale and Goyder *The Antitrust Laws of the USA* at p 377.

33 Baker 'Investigation and Proof of an Antitrust Violation' at p 150. He comments that this is very different from its original purpose as a means of preventing abusive prosecution.

34 See the Court's rulings in *US v Proctor and Gamble Co* 356 US 677, 78 S.Ct. 983 2 L.Ed.2d 1077 (1958). Discussed by L.Sullivan *Law of Antitrust* at p 755.

35 CIDs are issued under the Antitrust Civil Process Act 1962 ss.1311-1314, as amended by the Hart-Scott-Rodino Antitrust Improvements Act 1976. The legislation providing for this discovery

method was enacted following the Supreme Court ruling that grand juries could not be used to obtain evidence for civil actions. Discussed by Neale and Goyder *The Antitrust Laws of the USA* at pp 375-376 ; L.Sullivan *Law of Antitrust* at pp 755-756, 843-844, 851-852.

36 Ss.3,1312 Antitrust Civil Process Act 1962. Prior to the HSR amendments, only the firm under investigation could be compelled under a CID. Now, they may also be issued to any person, legal or natural.

37 S.1312(a), (b) Antitrust Civil Process Act 1962. The statute requires that the demand states the nature of the alleged violation and describes the class/classes of documentary material required "with such definiteness and certainty as to permit such material to be fairly identified". The CID must also identify the custodian of the material and prescribe a return date for the documents.

38 S.1312(c)(2) Antitrust Civil Process Act 1962. The issue of privilege is discussed further under 'Defence Rights - Investigation' infra.

39 For further information on FTC investigations, see : L.Sullivan *Law of Antitrust* at p 756 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 383-384 ; Davidow 'EEC Fact Finding Procedures in Competition Cases'; Hobbs 'A Role for the FTC' ; Lingos 'Transparency of Proceedings'.

40 Under ss.6, 9 FTC Act. The FTC can compel the testimony of any person with any potential knowledge of the relevant facts. The Commission's procedural rules require that the investigation hearing is fully recorded and that the transcripts are made part of the investigation. See 16 CFR s.2.8(b).

41 Ss.6001-6003 F.R.Cr.P..

42 S.6(b) FTC Act.

43 Under s.6(c) FTC Act, the FTC has addititonal powers to investigate and ensure the enforcement of decrees following DOJ cases. Under s.7, the Court may refer DOJ civil cases to the FTC requesting it in its judicial function to "ascertain and report on an appropriate form of decree therein". Further information on this may be obtained from Neale and Goyder *The Antitrust Laws of the USA* at pp 384-385.

44 Under 16 CFR s.1.33.

45 The division of responsibilities is discussed by Halverson 'Civil Investigations by the Goverment : New Developments' *Antitrust LJ* [1976] 537 ; Roll 'Dual Enforcement of the Antitrust Laws by the Department of Justice and the FTC : The Liason Procedure' *Business Lawyer* [1976] 2075 ; Steiger 'Effectively Enforcing Competition Laws : Some Aspects of the US Experience' in HAWK (Ed) *Annual Proceedings* Fordham Corp Law Inst (1991) p 10 ; Lingos 'Transparency of Proceedings' at pp 203-204.

46 Discussed further in Neale and Goyder *The Antitrust Laws of the USA* at p 373.

47 Hawk and Veltrop 'Dual Antitrust Enforcement in the United States' at pp 21-23.

48 On these points, see Hawk and Veltrop 'Dual Antitrust Enforcement in the United States' at p 22. These complaints form part of the current dissatisfaction with the FTC and have fostered debate over whether there is a continuing role for the Commission. These problems are discussed in greater depth by Hobbs in 'A Role for the FTC'.

49 The 5th Amendment to the Constitution provides that "no person...shall be compelled in any criminal case to be a witness against himself". See discussion in Joshua 'Proof in Contested EEC Competition Cases : A Comparison with the Rules of Evidence in Common Law' *ELR* [1987] 315 at pp 337-340 ; L.Sullivan *Law of Antitrust* at p 755.

50 *Hale v Henkel* (US S.Ct.1906) 221 US 361. Corporations cannot avoid discovery by arguing that all employees with relevant knowledge have invoked the privilege ; *City of Philadelphia v Westinghouse Electric Corp* (E.D.Pa.1962) 205 F.Supp. 830.

51 *Blunt Park Lane Hotel Ltd* [1942] 2 KB 253 at p 257.

52 McAnneny 'The Justice Department's Crusade' at p 530, explains that use immunity orders often reveal evidence of other related offences and unwary employees may leave themselves open to prosecution.

53 It should be noted that claims that use immunity orders are unconstitutional have been rejected by the Supreme Court ; *Kastigar v US* 406 US 441, 91 S.Ct. 1653 32 L.2d 212 (1972).

54 Under s.10 FTC Act and s.1001 F.R.Cr.P., refusals to give evidence, produce documents or the making of false statments to any federal agency are punishable by a fine of between $1,000 and $5,000 or one year's imprisonment or both. S.10 also provides that the destruction of documents or the falsifying of reports required under the Act is punishable by a fine of between $1.000 and $5,000 and/or three years imprisonment. S.9 FTC Act also allows the Commission to apply to the Court for an order requiring compliance. Thereafter, failure to comply in punishable as a contempt of court. Section 9 also provides for a writ of mandamus commanding compliance to be sought in instances of continuing refusal. In *US v Fruchtman* 421 F.2d 1019 (6th Circ 1964), the Court of Appeals upheld a prison sentence imposed for alteration of company documents after the initiation of an investigation. Discussed by Davidow 'EEC Fact Finding Procedures in Competition Cases' at pp 180-182.

55 S.10 FTC Act allows the imposition of fines of $100 per day.

56 Under F.R.Cr.P. s.1001,1505, refusals to give evidence, the making of false statements and the destruction of documents are all punishable under the same sanctions discussed at note 54 supra.

57 Under ss.1621, 1623 F.R.Cr.P., it is subject to a fine or up to five years imprisonment.

58 McAnneny 'The Justice Department's Crusade' at pp 527-528. In 1985, there were three indictments for obstruction and two for perjury before a grand jury. In 1987, there were seven obstruction indictments and 12 for perjury. On this, see Whalley (Asst. AG, Antitrust Division, DOJ) *Priorities and Practices - The Antitrust Division's Criminal Enforcemet Program Today* Remarks before the Bar of the City of New York on Per Se Antitrust Violations (April 8, 1988) at p 6.

59 Antitrust Civil Process Act 1962 ss.1314(a), (d).

60 For background information on this section, see : Joshua 'Proof in Contested EEC Competition Cases' ; Winterscheid 'Confidentiality and Rights of Access to Documents Submitted to the United States Antitrust Agencies' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 177 ; Epstein 'Parameters of the Attorney-Client Privilege in the Law of the United States' *Swiss Review of International Competition Law* [1985] 15 ; ABA Antitrust Section *Criminal Litigation Manual.*

61 At federal level, the rule has been codified in Rule 501, Federal Rules of Evidence. The Antitrust Civil Process Act 1962 s.1312(c)(2), also provides that no CID may require the production of documents which would be privileged from disclosure to a grand jury. The 'work-product' doctrine was recognised in *Re Grand Jury Proceedings* (CA.Fla.1979) 601 F.2d 162. The rule comes into play at the point where the documents can be said to have been prepared or obtained in anticipation of litigation. For further discussion, see in general Epstein 'Parameters of the Attorney-Client Privilege' ; Joshua 'Proof in Contested EEC Competition Cases' at pp 340-345 ; Winterscheid 'Confidentiality and Rights of Access'.

62 'Work-product' is primarily the lawyer's privilege. See Epstein 'Parameters of the Attorney-Client Privilege' at p 276.

63 *US v Aldridge* (CA.Ind.1973) 484 F.2d 655.

64 *Valente Pepsico Inc* (DC.Del.1975) 68 FRD 361. Eg the privilege cannot be used to conceal documents from the court's view simply by forwarding them to a lawyer ; *Re Grand Jury Proceedings (Malone)* (CA.Minn.1981) 655 F.2d 882. The privilege can also be overridden where "good cause" is shown ; *Hickman v Taylor* [1947] 329 US 495 at p 511, codified in Rule 26 Federal Rules of Civil Procedure (F.R.Civ.P.). Here there must be no other means of acquiring the evidence and the party must establish a "substantial need" of the documents. Discussed further by Joshua 'Proof in Contested EEC Competition Cases' at pp 344-345.

65 *Foster v Hall* (1831) 29 Mass (12 Pick) 89, 97 ; *US v Goldfarb* (C-6 1964) 328 F.2d 208 and *Burden v Church of Scientology* (DC.Fla.1981) 526 F.Supp. 44.

66 See Joshua 'Proof in Contested EEC Competition Cases' at p 343. Immunity orders are discussed in greater detail under the examination of grand jury investigations.

67 Baker 'Investigation and Proof of an Antitrust Violation' at p 150.

68 For background information on this stage see : L.Sullivan *Law of Antitrust* at pp 759-769 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 377-386 ; Baker 'Investigation and Proof of an Antitrust Violation': Stark 'Transparency Policy of the Antitrust Division US Department of Justice' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 197 ; Lingos 'Transparency of Proceedings' ; Denis 'Focusing on the Characterisation of Per Se Unlawful Horizontal Restraints' *Antitrust Bulletin* [1991] 641 ; McAnneny 'The Justice Department's Crusade' ; Nelson 'Reading Their Lips : Changes in Antitrust Policy under the Bush Administration' *Antitrust Bulletin* [1991] 681 ; Brennan 'Content, Controversy and Control : Politics and the Evolution of Antitrust Enforcement' *Law and Policy* [1992] 107 ; Griffin 'Economic Rationality Alters US Antitrust Enforcement' *LSG* [1985] 775 ; Johnson and Rupert 'US Antitrust Law' ; Buchheit 'Justice Department Guidelines on Vertical Restraints' *BLR* [1985] 103 ; Editorial 'US Antitrust Made Simple' *International Corporate Law* [1992] 10 ; Baxter 'Separation of Powers, Prosecutorial Discretion and the "Common Law" Nature of Antitrust Law' *Texas LR* [1982] 661 ; Litvack 'Goverment Antitrust Policy : Theory versus Practice and the Role of the Antitrust Division' *Texas LR* [1982] 649 ; Kauper 'The Role of Economic Analysis in the Antitrust Division Before and After the Establisment of the Economic Policy Office : A Lawyer's View' *Antitrust Bulletin* [1984] 111 ; ABA Antitrust Section *Criminal Litigation Manual* ; Wright *Federal Practice and Procedure : Criminal.*

69 Ss.1 and 4 ShA.

70 See below for further details on the decision whether to institute criminal or civil proceedings. Further information may also be obtained from : ABA Antitrust Section *Criminal Litigation Manual* ; Wright *Federal Practice and Procedure : Criminal* ; L.Sullivan *Law of Antitrust* at pp 759-769.

71 However, the defence are not allowed to see the draft indictment or memo of evidence. See Baker 'Investigation and Proof of an Antitrust Violation' at p 151 for further discussion.

72 Often at this stage the defence may produce information not revealed at grand jury stage. For further, see Baker 'Investigation and Proof of an Antitrust Violation' at p 151.

73 See McAnneny 'The Justice Department's Crusade' at pp 528-529 and Abraham *The Judicial Process* at p 105.

74 Under s.5(b) FTC Act, the FTC must not only have "reason to believe" that an unfair method of competition is being used, but also that "a proceeding by it in respect thereto would be to the interest of the public". However, when exercising its jurisdiction under ss.2, 3, 7 or 8 of the Clayton Act 1914, s.11 of the Act requires that the FTC take action whenever they have reason to believe a violation has occurred.

75 Following issuance of a draft complaint, defence counsel and FTC staff meet with the five Commissioners individually to discuss matters. This format is followed because of the Government in the Sunshine Act 1990, 5 USC s.551 et seq, which prevents the Commissioners from meeting collectively in camera with private parties. The final decision to prosecute is taken by the full Commission in camera in the absence of defence counsel.

76 See S.5(b) FTC Act and discussion in Neale and Goyder *The Antitrust Laws of the USA* at pp 385-386.

77 For further discussion of policy goals see Ch2 supra.

78 See Brennan 'Content, Controversy and Control'. In an extremely interesting discussion, Brennan questions whether prosecution policy should be determined exclusively by legal standards or whether economic, political and other factors should be permitted to influence the decision, He goes on to consider the impact of these factors on prosecution policy. Kauper 'The Role of Economic Analysis in the Antitrust Division' ; Litvack 'Goverment Antitrust Policy' and Baxter 'Prosecutorial Discretion', also discuss both the theory and practice of prosecutorial decision-making in antitrust cases. In addition, Langenfeld and Scheffman 'Evolution or Revolution - What is the Future of Antitrust' *Antitrust Bulletin* [1986] 287 ; Baker and

Blumenthal 'Ideological Cycles and Unstable Rules' *Antitrust Bulletin* [1986] 323 ; Gellhorn 'Climbing the Antitrust Staircase' *Antitrust Bulletin* [1986] 341 and Fox 'The Politics of Law and Economics in Judicial Decision-Making : Antitrust as a Window' *NYULRev* [1986b] 554, all examine the changing focus of antitrust policy.

79 See Brennan 'Content, Controversy and Control' at pp 109, 111-112, 115-117. At p 118, Brennan criticises this political influence at an individual case level, though not at a general policy level. McChesney in 'Law's Honor Lost : The Plight of Antitrust' *Antitrust Bulletin* [1986] 359 and Fox in 'The Politics of Law and Economics in Judicial Decision-Making' [1986b], have been strongly critical of the fact that antitrust has been used over the years for political expediency rather than enhancing competition. Brennan contrasts the present approach with the 'legal' influences of the 1960s which produced a prosecution policy focused on the protection of small businesses and the 'academic' approach of the 1970s with its focus on economic efficiency and its very tolerant prosecution policy.

80 The changes in policy are discussed thoroughly in McAnneny 'The Justice Department's Crusade' ; Nelson 'Reading Their Lips'.

81 The lenient attitude of Reagan enforcement is discussed in detail in Nelson 'Reading Their Lips' and in Rule (Asst. AG, Antitrust Division, DOJ) *Criminal Enforcement of the Antitrust Laws : Targeting Naked Cartel Restraints* Address before the ABA Annual Spring Meeting (March 24, 1988). For an example of the criticism directed at the Reagan enforcement programme, see ABA Task Force Report 'ABA Task Force Calls for Stepped up Antitrust Enforcement' *Antitrust* [1990] 7, which criticises the Division's "non-enforcement rhetoric" and "studied avoidance of 'bad' cases". McAnneny 'The Justice Department's Crusade' at p 522, notes that criminal prosecutions under the Reagan Administration doubled in comparison with the Carter administration.

82 Nelson in 'Reading Their Lips' discusses the policy changes between Reagan and Bush Administrations, noting the latter's apparently tougher prosecution policy. Nelson questions the precise nature of this change and the extent to which it will translate into actual prosecutions.

83 See Nelson 'Reading Their Lips' at pp 684-688 and Rill (Asst. AG, Antitrust Division, DOJ) *Antitrust Enforcement : An Agenda for the 1990s* Remarks before the 23rd Annual New England Antitrust Conference (Nov 3, 1989) at p 10. Case examples of this tougher approach include the *Ethyl* case - *El du Pont de Nemours and Co v FTC* 729 F.2d 128 (2d Circ 1984) and DOJ investigations into price signalling by airlines and FTC investigation into parallel behaviour by infant formula manufacturers, discussed by Nomani 'Airlines May Be Using a Price Data Network to Lessen Competition' *Wall St Jo* 28/6/1990 and 'Infant Formula Manufacturers Targeted for Antitrust Investigation' 323 *FTC Watch* 4/6/90.

84 Though evaluation of collusion and restrictive practices by professional organisations remain the same. But, Rill (Asst. AG Antitrust Division) in *Antitrust Enforcement: An Agenda for the 1990s* Remarks before the 23rd Annual New England Antitrust Conference (Nov 3, 1989) at p 6 and Arquit (Director of Bureau of Competition, FTC) in Remarks before the Cleveland Chapter of the Federal Bar Association (December 14, 1989), both indicated that prosecution was more likely and detailed various changes, noting that in particular, standards for finding barriers to entry have been lowered.

85 See Nelson 'Reading Their Lips' at pp 692-697, indicating that both the DOJ and FTC are more active, though the FTC is more so. See Nelson ibid, particularly Table at p 694, detailing lawyers' perceptions of changes in DOJ/FTC prosecution policy in relation to specific offences.

86 Nelson 'Reading Their Lips' at p 696. It seems that the problem is exacerbated by the fact that there are two federal enforcement agencies both with an erratic approach to the prosecution of specific offences. One lawyer interviewed by Nelson at p 696, likened the FTC to an L.A. street gang, criticising the lack of supervision over procedural fairness, the verification of facts or the overall legal situation.

87 Editorial 'US Antitrust Made Simple' at p 10.

88 See 4 Trade Reg. Rep. (CCH) 13,105. The application of these guidelines is discussed by Griffin 'Economic Rationality Alters US Antitrust Enforcement' ; Buchheit 'Justice Department Guidelines on Vertical Restraints' ; Johnson and Rupert 'US Antitrust Law'.

89 For criticism see Hawk and Veltrop 'Dual Antitrust Enforcement in the United States' at pp 23-26.

90 For further details, see Davidow 'EEC Fact Finding Procedures in Competition Cases' at pp 177-178.

91 Kaysen and Turner *Antitrust Policy* Harvard Unv. Press (1959) at p 256, argued that "unambiguously ... bad conduct" should be listed in antitrust statutes and only listed offences should be regarded as criminal. Issues involved in the choice of proceedings are also discussed by Neale and Goyder *The Antitrust Laws of the USA* at pp 377-379 ; Baker 'To Indict or Not to Indict : Prosecutorial Discretion in Sherman Act Enforcement' *Cornell LR* [1978] 405 and McAnneny 'The Justice Department's Crusade' at pp 525-528.

92 Eg in monopoly situations and collusive practices, where it is more effective to seek equitable relief restraining the practice, and where appropriate, dissolution and divestiture.

93 See Baker 'To Indict or Not to Indict'; McAnneny 'The Justice Department's Crusade' at p 525.

94 In cases where the DOJ is less certain of the anti-competitive nature of the practice, it will institute civil proceedings and allow the Court to weigh the relative advantages and disadvantages of the cases. See McAnneny 'The Justice Department's Crusade' at p 525.

95 These criteria are discussed by Denis 'Per Se Unlawful Horizontal Restraints' at pp 674-649 ; McAnneny 'The Justice Department's Crusade' at pp 526-527 and Rule (Asst. AG, Antitrust Division, DOJ) *Criminal Enforcement of the Antitrust Laws : Targeting Naked Cartel Restraints* Address before the ABA Annual Spring Meeting (March 24, 1988) at pp 9-15. The Supreme Court articulated similar criteria in *US v Unites States Gypsum Co* 438 US 422 (1978) at pp 435-436. Discussed by Baker 'Investigation and Proof of an Antitrust Violation' at pp 148-149.

96 See McAnneny 'The Justice Department's Crusade' at pp 531-532, who states that, as a general rule, the DOJ will indict where it has two or more witnesses to a crime, or has one witness and strong supporting evidence.

97 Eg *US v Jack Spector Inc* Cr No.87-20084 (D.Kansas, filed 11/9/87), where the DOJ relied on circumstantial evidence of bid pattern data to obtain a conviction.

98 See earlier discussion of the political influence on prosecutorial decision-making.

99 During the Carter Administration (1977-1980), an average of 38 criminal antitrust cases were filed per annum. During the first seven years of the Reagan Administration (1981-87), an average of 80 prosecutions per annum were undertaken. In the first year of the Bush Administration, 91 criminal cases were pursued. This tougher approach to prosecution has been continued by the Clinton Administration. Between 1981-1987, there were 546 criminal antitrust cases indicting a total of 993 defendants, 581 of which were corporations and 412 of which were individuals. For further details, see Whalley (Deputy Asst. AG, Antitrust Division) *Crime and Punishment - Criminal Antitrust Enforcement in the Nineties* Address before the ABA Annual Antitrust Spring Meeting (March 22, 1990) and Robert Bloch (Chief, Professions and Intellectual Property Section, Antitrust Division) *Compliance Programs and Criminal Antitrust Litigation : A Prosecutor's Perspective* Address before the ABA Annual Antitrust Spring Meeting (March 24, 1988). See also Baker 'Investigation and Proof of an Antitrust Violation'

100 The breadth of the antitrust rules is widely acknowledged. See further discussion of the substantive law in L.Sullivan *Law of Antitrust* Ch3 ; Neale and Goyder *The Antitrust Laws of the USA* Chs 1-3 ; Fox 'The Modernisation of Antitrust'.

101 For additional discussion of these defence rights, see : Winterscheid 'Confidentiality and Rights of Access' ; Lingos 'Transparency of Proceedings' ; Stark 'Transparency Policy of the Antitrust Division' ; Davidow 'EEC Fact Finding Procedures in Competition Cases' ; Joshua 'Proof in Contested EEC Competition Cases' ; Archer 'Discovery for Defendants in Criminal Antitrust Cases' *Business Lawyer* [1965] 911 ; L.Sullivan *Law of Antitrust* at pp 755-769 ; ABA Antitrust Section *Criminal Litigation Manual.*

102 The Freedom of Information Act 1966 (FOIA) also provides a public right of access to federal agency records, subject to certain exemptions. The overall effect of these exclusions is to prevent disclosure of government files at investigation stage. Broad rights of discovery for defendants under procedural rules mean defendants do not need to resort to the FOIA for discovery. More often, the FOIA is used as a means of discovery in private actions. For these reasons, the provisions of the FOIA will not be examined here, though further discussion may be found in Winterscheid 'Confidentiality and Rights of Access' at pp 178-179.

[103] Winterscheid 'Confidentiality and Rights of Access' ; Davidow 'EEC Fact Finding Procedures in Competition Cases' ; L.Sullivan *Law of Antitrust* at pp 755-769, all discuss these issues in detail. In addition, Lingos 'Transparency of Proceedings' and Stark 'Transparency Policy of the Antitrust Division', examine the overall transparency of DOJ and FTC proceedings.

[104] Rule 26(b)(1) F.R.Civ.P. allows for the disclosure of any material "reasonably calculated to lead to the discovery of admissible evidence".

[105] For further on 'work product', see earlier discussion of legal professional privilege and also below under 'Limitations on Access'. The issue is also examined by Joshua 'Proof in Contested EEC Competition Cases' and Davidow 'EEC Fact Finding Procedures in Competition Cases'.

[106] Interrogatories may be served under Rule 33 F.R.Civ.P., document demands under Rule 34 F.R.Civ.P. and requests for admission under Rule 36 F.R.Civ.P..

[107] See ABA Antitrust Section *Criminal Litigation Manual* ; Davidow 'EEC Fact Finding Procedures in Competition Cases' ; Joshua 'Proof in Contested EEC Competition Cases'.

[108] See particularly, Rules 6 and 16(a)(3) F.R.Cr.P.. Discussed by L.Sullivan *Law of Antitrust* at p 755 and ABA Antitrust Section *Criminal Litigation Manual.*

[109] See discussion by Spratling at the Leiden Seminar in in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* at pp 190-191.

[110] See Archer 'Discovery for Defendants in Criminal Antitrust Cases' *Business Lawyer* [1965] 911.

[111] Here disclosure is governed by s.5 FTC Act, the Administrative Procedure Act 15 USC ss.554 and Part 3 of the FTC's Rules of Practice, 16 CFR s.3 (1991). These rules are based on the Federal Rules of Civil Procedure and whilst the latter are not binding on the FTC, they are used as guidance in FTC procedures. See *Exxon Corp* 98 FTC 107 (1981). Discussed by Winterscheid 'Confidentiality and Rights of Access' at pp 182-183.

[112] See FTC Rules of Procedure, 16 CFR s.3.31(b)(1), though defendants are not required to show that the evidence could be obtained from other sources.

[113] Under 16 CFR s.3.31(a), (b)(1). Ss.3.3 and 3.34(b) of the FTC's Rules of Procedure also make similar provision for interrogatories, document demands and requests for admission as seen in DOJ civil cases. Discussed by Davidow 'EEC Fact Finding Procedures in Competition Cases' at pp 184-185.

[114] See eg, *Avnet Inc.* 77 FTC 1689 (1970). Disclosure has been denied where the parties filing the reports were promised confidentiality, eg *Chock Full O'Nuts Corp* 82 FTC 747 (1973).

[115] See Winterscheid 'Confidentiality and Rights of Access' at pp 180-182. This method was used in *FTC v US Pipe and Foundry Co* 304 F.Supp. 1254 (DC.DC.1969). Other methods of overcoming 'confidentiality' are the editing of documents and the aggregation of data by an independent party in a way which preserves the anonimity of the parties - known as the "Mississippi River" treatment - see *Mississippi River Fuel Corporation* 69 FTC 1186 (1966). Joshua 'Balancing the Public Interest : Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedure' *ECLR* [1994] 68, discusses the definition and protection of confidential information in the EC, UK and US. See also, Connelly 'Secrets and Smokescreens' *Wisc LR* [1981] 207 and McKown 'Discovery of Trade Secrets in Litigation in the United States' *EIPR* [1993] 327.

[116] See Antitrust Civil Process Act 1962, s.1313(c)(3) and 16 CFR 4.10(g). Discussed by Joshua 'Balancing the Public Interest' at pp 74-75 and Winterscheid 'Confidentiality and Rights of Access' at pp 180-182, 184.

[117] This element was stressed in the FTC case of *Re HP Hood and Sons* Docket 7709 (11/3/1961). This is a higher standard than normally applies to the protection of confidential information. Outside the litigation context, s.6(f) FTC Act, as amended by the FTC Improvements Act 1980, prohibits the disclosure of trade secrets and commercial information as privileged or confidential where disclosure could reasonably be expected to cause substantial competitive harm. As such, s.6(f) will not necessarily bar disclosure in adjudicative proceedings, see *FTC v Tuttle* 244 F.2d 605 (CA. 2, 1957).

[118] This issue is discussed in greater depth in Joshua 'Proof in Contested EEC Competition Cases', who compares the EC, UK and US situations.

[119] *City of Burlington, Vermont v Westinghouse Electrical Corporation* (DC.DC.1965) 246 F.Supp. 839.

[120] Eg *Roviaro v US* (US S.Ct. 1957) 353 US 53 and *Riley v US* (CA.Ariz.1969) 411 F.2d 1146, cert. denied 397 US 906. Both cases also make it clear that the privilege is that of the agency and not the informer.

[121] See *Roviaro v US* (US S.Ct. 1957) 353 US 53.

[122] *US v Halbert* (CA-10 1981) 688 F.2d 489, cert. denied 456 US 934. Joshua in 'Proof in Contested EEC Competition Cases' at p 347, states that, in practice, where the informer has been an active participant in the violation, his identity is usually revealed.

[123] Both the 'attorney-client' aspect and '"work product' doctrine of US legal professional privilege are discussed by Joshua 'Proof in Contested EEC Competition Cases'. See also examination of this privilege in the context of 'Defence Rights - Investigation' supra.

[124] See *Hickman and Taylor* 329 US 495 (1947).

[125] F.R.Civ.P. Rule 26(b)(3).

[126] F.R.Civ.P. Rule 26(b)(3).

[127] F.R.Civ.P. Rule 26(b)(3).

[128] See F.R.Civ.P. Rule 26(b)(4)(A) and 16 CFR s3.31(b)(4)(A) in DOJ and FTC cases respectively. In *Wilson v Resnick* 51 FRD 510 (E.D.Pa.1970), discovery of an expert's report was allowed following a strong showing of need. In addition, fact/opinions held by an expert who is not called at trial are only discoverable in "exceptional circumstances" where it is impractical to obtain the information from other sources ; F.R.Civ.P. 26(b)(4)(B).

[129] See discussion by Winterscheid 'Confidentiality and Rights of Access' at pp 184-185.

[130] Where an agency intends to introduce certain documents as evidence at trial, these must be included in the exhibits list, even though the agency may legitimately have withheld them from discovery under one of the limitations outlined above. See discussion in Winterscheid 'Confidentiality and Rights of Access' at p 185.

[131] See in particular, comments made by Wood 'User-Friendly Competition Law in the US' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 6 on these issues.

[132] Though, in practice, the prosecution's more extensive resources probably mean that it still possesses the advantage in the acquisition of evidence and the development of its case.

[133] For more specific discussion of the mechanisms of the federal court system, see : Abraham *The Judicial Process* in general and Baker 'Investigation and Proof of an Antitrust Violation' at pp 148-152.

[134] The procedure here is similar to that of a US district court sitting without a jury, see Baker 'Investigation and Proof of an Antitrust Violation' at pp 152-158 and Neale and Goyder *The Antitrust Laws of the USA* at p 380 et seq.

[135] Under *National Society of Professional Engineers v US* 435 US 679, 692 (1978), such non-ancilliary restraints are those "whose nature and necessary effect are so plainly anti-competitive" that they are regarded as "illegal per se" regardless of the reasons for the practices and without any real inquiry into their effect.

[136] For broad discussion of this analytical approach, see : Whish *Competition Law* at pp 206-211 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 21-30 ; L.Sullivan *Law of Antitrust* at pp 165-186. See also Hay 'Pigeonholes in Antitrust' *Antitrust Bulletin* [1984] 133 ; Bock 'An Economist Considers Some Basic Issues of Antitrust Law in the US' *ECLR* [1990] 52 ; Fox 'The

Modernisation of Antitrust' ; Fox and L.Sullivan 'Antitrust - Retrospective and Prospective' [1987a], who all trace the development of this format and consider the factors affecting the characterisation of particular agreements under this approach. Schecter 'The Rule of Reason in European Competition Law' *LIEI* [1982] 1 ; Forrester and Norall 'The Laicisation of Community Law : Self Help and The Rule of Reason : How Competition Law Is and Could Be Applied' *CMLR* [1984] 11 and Whish and Sufrin 'Article 85 and the Rule of Reason' *YBEL* [1987] 1, all consider whether a similar analytical format exists in the EC context, and if not, whether such approach should be adopted.

137 The main proponents of this approach are Bork *The Antitrust Paradox : A Policy At War with Itself* (1978) ; Posner 'Antitrust Policy and The Supreme Court' *Columbia LR* [1975b] 282 ; Posner *Antitrust Law* Millstein (1976) ; Posner 'The Chicago School of Antitrust' *Un Penn LR* [1979] 925 ; Posner *The Economics of Justice* Chicago (1981b) ; Easterbrook 'The Limits of Antitrust' *Texas LR* [1984a] 1 ; Easterbrook 'Workable Antitrust Policy' *Mich LR* [1986] 1696. Posner in *The Economics of Justice* (1981b) at pp 113-115, argues that efficiency is justice.

138 A wealth of critical literature exists, eg Hovenkamp 'Antitrust Policy After Chicago' *Mich LR* [1985] 213 ; Hovenkamp 'Rhetoric and Skepticism in Antitrust Argument' *Mich LR* [1986] 1722 ; Fox 'The Modernisation of Antitrust' ; Fox 'Consumer Beware Chicago' *Mich LR* [1986a] 1714 ; Sims and Landes 'The End of Antitrust - Or a New Beginning' *Antitrust Bulletin* [1986] 287 ; Lipsky 'Antitrust Without Apology' *Antitrust Bulletin* [1986] 481 ; Spiller 'Comments on Easterbrook and Snyder' *Jo Law and Economics* [1985] 489 ; Blake and Jones 'In Defense of Antitrust *Columbia LR* [1965] 377.

139 Fox in 'Antitrust in its Second Century : The Phoenix Rises From the Ashes' *Antitrust Bulletin* [1986c] 383 at p 392, describes this opposition to antitrust as "capitalism with a vengance". The hidden political focus of antitrust is also discussed by Fox 'The Politics of Law and Economics in Judicial Decision-Making' [1986b] ; Fox 'Teaching and Learning Antitrust - Politics, Politics, Casebooks and Teachers' *NYULRev* [1991] 225 ; Fox 'The Modernisation of Antitrust' and Fox and L.Sullivan 'Antitrust - Retrospective and Prospective' [1987a]. This aspect is also examined by Schwartz '"Justice" and Other Non-Economic Goals of Antitrust *Un Penn LR* [1978-1979] 1076 ; Pitofsky 'The Political Content of Antitrust' *Un Penn LR* [1978-79] 1051 ; Kingdon 'Economic Argument in Antitrust Cases : An American Litigator's Perspective' *ECLR* [1987] 371 and McChesney 'Law's Honor Lost', who is particularly critical of antitrust's subversion for political expediency.

140 These problems are discussed in Hay 'Pigeonholes in Antitrust' ; Bock 'Basic Issues of Antitrust Law' ; Hawk 'The American Antitrust Revolution : Lessons for the EEC ?' *ECLR* [1988] 53 ; Kingdon 'Economic Argument in Antitrust Cases' in general.

141 The assessment of vertical restraints has been the subject of particular controversy. See Robinson 'Explaining Vertical Agreements : The *Colgate* Puzzle and Antitrust Method' *Virginia LR* [1994] 577 ; Phillips and Mahoney 'Unreasonable Rules and Rules of Reason : Economic Aspects of Vertical Price-Fixing' *Antitrust Bulletin* [1985] 99 ; McGibbon 'Proof of a Vertical Conspiracy Under *Monsanto*' *Antitrust Bulletin* [1985] 11 and Burns 'Rethinking the "Agreement" Element in Vertical Antitrust Restraints' *Ohio State Law Journal* [1990] 1.

142 Denis in 'Per Se Unlawful Horizontal Restraints', has been particularly critical of this trend.

143 See Fox 'The Modernisation of Antitrust' ; Hawk 'The American Antitrust Revolution' at pp 58-60 ; Denis 'Per Se Unlawful Horizontal Restraints'at pp 642-643.

144 This has variously been expressed in US cases as meaning that the jury must have no "doubt that would cause prudent men to hesitate before acting in matters of importance to themselves" and "almost certainly true". See Wright *Federal Practice and Procedure : Criminal* s.500. Also, McBaine 'Burden of Proof: Degrees of Belief' 32 *California LR* [1944] 242.

145 Here the Government must be "more convincing" ; "of greater weight", see *Braud v Kinchen* 310 So.2d 657, 659 (1975). In *Grogan v Garner* 111 S.Ct. 654, 659 (1991), the Court held that this standard should result in "a roughly equal allocation of the risk of error between the litigants". Other evidential matters such as hearsay and expert evidence are dealt with by Joshua 'Proof in Contested EEC Competition Cases' and Brunt 'The Use of Economic Evidence in Antitrust Litigation : Australia' *Australian Business LR* [1986] 261, who compares US and Australian positions.

146 See discussion by Denis 'Per Se Unlawful Horizontal Restraints' ; Burns 'Rethinking the "Agreement" Element' ; Brunt 'The Use of Economic Evidence in Antitrust Litigation', who all

examine the nexus between analytical format and evidential requirements. These issues are also discussed in the examination of proof in EC competition cases in Ch4 supra.

147 And concomitantly more difficult for the defendant to disprove the allegation. On this, see Denis 'Per Se Unlawful Horizontal Restraints' at p 644.

148 This approach has been taken in an extensive range of cases, see eg *US v Socony - Vacuum Oil Co* 310 US 150, 233 (1940), and more recently, in *Palmer v BRG of Georgia Inc* 111 S.Ct. 401 (1990) and *FTC v Superior Court Trial Lawyers Assn* 493 US 411 (1990), which made clear that whether the agreement was actually implemented and its market impact were irrelevant. As the Court of Appeals in *US v Realty MultiList Inc.* 629 F.2d 1351, 1362-1363 (5th Circ 1980) explained, "The per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score".

149 See particularly, Burns 'Rethinking the "Agreement" Element' at pp 4-9 and Turner 'The Definition of Agreement under the Sherman Act - Conscious Parallelism and Refusals to Deal' *Harvard LR* [1962] 655.

150 See Burns 'Rethinking the "Agreement" Element' at p 7. Compare the Court's approach in cases like *US v Joint Traffic Assn* 171 US 505 (1898) and *US v Gen Motors Co* 384 US 127 142-143 (1966) with *Sugar Inst Inc v US* 297 US 553 (1936), where the Court refused to find an agreement for antitrust purposes.

151 Brunt 'The Use of Economic Evidence in Antitrust Litigation' at pp 284-288, discusses these concerns more thoroughly. For an opposing view, see Joshua 'Proof in Contested EEC Competition Cases' at pp 328-330.

152 *US v Jack Spector Inc* Cr No.8 7-20084 (D. Kansas filed 11/9/87) ; *Pittsburg Plat Glass v US* (CA-4 1958) and *Tennant v Peoria and PU Ry Co* 321 US 29.

153 See eg, *Continental Ore Co v Union Carbide and Carbon Corporation* (1962) 370 US 690, 698-699. Though in *Standard Oil Co of California v Moore* (CA-9 1957) 251 F.2d 188, the Court of Appeals stressed that, where the evidence was entirely circumstantial, a finding of guilt could only be found where the facts were not only consistent with guilt, but also inconsistent with any other reasonable explanation.

154 Eg *Boise Cascade Corp* 91 FTC 1 (1978), 638 F.2d 573 (9th Circ 1980), enforcement denied and *Ethly Corp* 101 FTC 425 (1983), order vacated in *El Du Pont de Nemours v FTC* 729 F.2d 128 (2d Circ 1984). The FTC has also suffered reversals on a finding that it has acted outside its jurisdiction, eg in *Airline Guide Case 1980* ; *Reuben H. Donnelly Corp* 95 FTC 1 (1980), enforcement denied, 630 F.2d 920 (2d Circ 1980) and *Indiana Federation of Dentists v FTC* 101 FTC 425 (1983), rev'd 745 F.2d 1124 (7th Circ 1984), petition for cert. granted, 88 L.Ed.2d 224 (1984). Such failures have added to criticism of the FTC and calls for its abolition. On this, see discussion in Hobbs 'A Role for the FTC'.

155 This has occurred in several price-fixing cases where the Supreme Court have asserted that the treatment of these cases must be more than a mechanical evaluation and has insisted upon a rule of reason analysis of the agreement. See *Broadcasting Music Inc v Columbia Broadcasting System Inc* 441 US 1, 9 (1979) ; *NCAA v Board of Regents* 468 US 85 (1984) and Justice Powell's dissent in *Arizona v Maricopa County Medical Society* 457 US 332, 362 (1982). This has provoked considerable debate over the possible demise of the per se rule. See particularly, Easterbrook 'The Limits of Antitrust' [1984a] and Posner 'Antitrust Policy and the Supreme Court' [1975b].

156 Denis in 'Per Se Unlawful Horizontal Restraints', has been particularly critical of these problems of characterisation. The issues involved are also discussed by Wirtz 'Rethinking Price-Fixing' *Indiana LR* [1987] 591 and Allison 'Ambiguous Price-Fixing and the Sherman Act : Simplistic Labels or Unavoidable Analysis?' *Houston LR* [1979] 761.

157 This approach is used in vertical non-price restraints including location clauses and customer and territorial restrictions. The leading case here is *Continental TV Inc v GTE Sylvania Inc* 433 US 36 (1977). For further discussion of the rule of reason approach in vertical cases and critical analysis of this case, see L.White 'Vertical Restraints in Antitrust Law : A Coherent Model' *Antitrust Bulletin* [1981] 327 ; Carter 'From Peckham to White : Economic Welfare and the Rule of Reason' *Antitrust Bulletin* [1980] 275 ; Easterbrook 'Vertical Arrangements and the Rule of Reason' *Antitrust LJ* [1984b] 135 and Hovenkamp 'Antitrust Policy After Chicagco' ; Posner 'The Next Step in the Antitrust Treatment of Restricted Distribution : Per Se Legality' *Un Ch LR* [1981a] 6 ; Pitofsky 'The Sylvania Case: Antitrust Analysis of Non-Price Vertical

Restrictions' *Columbia LR* [1978] 1. Price restraints in vertical agreements are dealt with under the per se rule. See discussion infra.

158 See Brunt 'The Use of Economic Evidence in Antitrust Litigation' at pp 266-267.

159 See Brunt 'The Use of Economic Evidence in Antitrust Litigation' in general. Much of this problem derives from the fact that this construction is presented as "scientific truth".

160 On this, see Kingdon 'Economic Argument in Antitrust Cases' at pp 379-381. In this context, Brunt 'The Use of Economic Evidence in Antitrust Litigation' at pp 302-307, criticises the mixture of law and economics in the rule of reason approach.

161 See discussion above and Burns 'Rethinking the "Agreement" Element' at pp 4-9.

162 See Robinson 'Explaining Vertical Agreements' at pp 597-598 and Burns 'Rethinking the "Agreement" Element' at pp 10-16.

163 The problems alluded to below are examined more extensively in Robinson 'Explaining Vertical Agreements' ; Phillips and Mahoney 'Unreasonable Rules and Rules of Reason' ; McGibbon 'Proof of a Vertical Conspiracy Under *Monsanto*' ; Burns 'Rethinking the "Agreement" Element'.

164 *Dr. Miles Medical Co v John D. Park and Sons Co* 220 US 373 (1911).

165 *US v Colgate and Co* 250 US 300 (1919). Such arrangements were entirely legal and outside the scope of the Sherman Act.

166 See particularly,the cases of : *US v Schrader* 252 US 85 (1920) ; *Frey & Son v Cudahy Packing Co* 256 US 208 (1921) ; *FTC v Beech Nut Packing Co* 257 US 441 (1922) ; *US v Parke, Davis & Co* 362 US 29 (1960) ; *Albrecht v Herald Co* 390 US 148 (1968). The Supreme Court's analysis of these cases is discussed in detail in Robinson 'Explaining Vertical Agreements' ; Phillips and Mahoney 'Unreasonable Rules and Rules of Reason' ; McGibbon 'Proof of a Vertical Conspiracy Under *Monsanto*' ; Bock 'Basic Issues of Antitrust Law'.

167 The highwater mark came in *Albrecht v Herald Co* 390 US 148 (1968), which set out broad, easily met standards for proving a conspiracy. Whilst the Court have always been hostile to the *Colgate* exception, it has never been expressly overruled and indeed was recently upheld in *Russell Stovers Candies Inc v FTC* 718 F.2d 256 (8th Circ 1983), where the Court reversed an FTC finding that *Colgate* was no longer good law. See also, *Monsanto Co v Spray-Rite Serv Corp* 465 US 752 (1984). Not surprisingly, the *Colgate* decision has produced considerable critical literature, eg Baxter 'The Viability of Vertical Restraints Doctrine' *California LR* [1987] 933 and Flynn 'The Function and Dysfunction of Per Se Rules in Vertical Market Restraints' *Washington University LQ* [1980] 767 and Hawk 'The American Antitrust Revolution'.

168 See *Monsanto Co v Spray-Rite Serv Corp* 465 US 752 (1984),at p 764, which held that a supplier's termination of a dealer following complaints from the latter's competitors is not in itself sufficient basis for inferring an agreement. The plaintiff must also show that there was a conscious commitment to a common scheme designed to achieve an unlawful object. Whilst *Business Electronics v Sharp Electronics* 485 US 717 (1988) held that even a showing of an agreement between a supplier and a dealer to terminate another dealer is insufficient unless it is also established that the supplier and complaining dealer agreed about resale prices.

169 Burns 'Rethinking the "Agreement" Element' at pp 10, 18, 24-25 ; Robinson 'Explaining Vertical Agreements' at p 602 and McGibbon 'Proof of a Vertical Conspiracy Under *Monsanto*' at p 25, assert that many of the problems here stem from the Supreme Court's failure to recognise that fundamental differences exist between a horizontal and a vertical agreement. As a result, the Court have inappropriately transposed the rationale and techniques underlying analysis of horizontal agreements into the vertical context with disastrous results.

170 McGibbon 'Proof of a Vertical Conspiracy Under *Monsanto*' at pp 22-33, discusses the problems of proof under *Monsanto* in detail.

171 See Burns 'Rethinking the "Agreement" Element' at pp 27-29.

172 See Burns 'Rethinking the "Agreement" Element' at pp 29-31.

[173] The Court in *Monsanto* at pp 1470-1471, recognised this, pointing out that often the conduct and the economic impact of both types of restraint are similar. Discussed by McGibbon 'Proof of a Vertical Conspiracy Under *Monsanto*' at pp 20-21 and Burns 'Rethinking the "Agreement" Element' at p 18.

[174] Phillips and Mahoney 'Unreasonable Rules and Rules of Reason' at pp 100-101, 112-115 ; Easterbrook 'Vertical Arrangements and the Rule of Reason' [1984b] at pp 140-143 ; Allison 'An Analysis of the Vertical Non-Price Dichotomy' *Akron LR* [1987] 131 ; Hay 'Vertical Restraints after *Monsanto*' *Cornell LR* [1985] 418, at pp 429-430 ; Posner 'Per Se Legality' [1981a] at pp 22-26. In this context, Robinson 'Explaining Vertical Agreements' at pp 578-579, points out that the Supreme Court's reasons for applying the rule of reason to non-price restraints are the same as those they rejected for applying the rule of reason to price restraints.

[175] Neale and Goyder *The Antitrust Laws of the USA* Chs 12, 13 ; Spratling 'Fines in Criminal Antitrust Cases' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 76 ; McAnneny 'The Justice Department's Crusade' ; Blair 'Antitrust Penalties : Deterrence and Compensation' *Utah LR* [1980] 57 ; Hobbs 'A Role for the FTC'.

[176] The Division's ability to obtain consent decrees will be dealt with below under 'Informal Resolutions'.

[177] The Court exercise their powers under the Antitrust Procedures and Penalties Act 1974 (APPA), 15 USCA s.16 (1974) - also known as the Tunney Act.

[178] *US v Paramount Pictures* 334 US 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948). Discussed by Neale and Goyder *The Antitrust Laws of the USA* at p 168 et seq.

[179] Under the injunction, detailed rules regulated the conditions under which the companies made available the various runs of film. In addition, pooling arrangements between theatres were dissolved and joint ownership of theatres was terminated. Licensing agreements between major distributors and large exhibiting circuits and the block booking of film were prohibited because of their anti-competitive effects.

[180] Indeed, Neale and Goyder *The Antitrust Laws of the USA* at pp 394-395, note that the whole aim of a DOJ civil action is to obtain jurisdiction over the parties so that it can regulate their business conduct on a long-term basis.

[181] S.5 FTC Act. This is similar to a court order following a civil case.

[182] S.5 FTC Act. Moreover, each subsequent day on which the order is violated constitutes a separate violation and may be fined accordingly. However, the remedy is not generally enforced.

[183] S.5(m)(B) FTC Act.

[184] Recent examples are *FTC v Superior Court Trial Lawyers Assn* 493 US 411 (1990) and *NCAA v Board of Regents* 468 US 85 (1984).

[185] Hobbs 'A Role for the FTC' at pp 470-471, goes on to argue that legal sanctions should be reserved for extreme cases where an opportunity for voluntary compliance has been given and refused.

[186] Ie The Criminal Enforcement Act 1984 and the Sentencing Reform Act 1984, as amended by the Criminal Fines Improvement Act 1987. The impact of this legislation is discussed below.

[187] The Commission was introduced under the Comprehensive Crime Control Act 1984, following criticism of sentencing disparities. The Commission is an independent body within the judicial branch of the US government. It was directed to develop mandatory sentencing guidelines. These issues are discussed further in Fitzmaurice and Pease *The Psychology of Judicial Sentencing* Manchester Unv. Press (1986); WASIK and PEASE (Eds) *Sentencing Reform - Guidance or Guidelines* Manchester Unv. Press (1987).

[188] These guidelines are binding on both Court and prosecutors. As a result, they significantly reduced the degree of judicial discretion. See discussion in Spratling 'Fines in Criminal Antitrust Cases' at p 76.

189 The 1987 Guidelines apply to all antitrust offences occurring after 1 November 1987. The 1991 Guidelines affect all violations committed or continued after 1 November 1991. Prior to 1987, APPA sanctions apply. The statute of limitations in Sherman Act violations is five years. The date an offence was committed is now very important as the sanctions imposed under the two sets of guidelines vary considerably.

190 15 USC s.1 and 18 USC s.3571(c)(3).

191 18 USC s.3571(d). Ie a fine the greater of twice the gross pecuniary gain the defendant derived from the offence, or twice the loss suffered by the victim of the violation may be imposed, unless the imposition of such a fine would unduly complicate the sentencing process. The maximum fines apply to each separate violation. In multiple offences, the maximum would be considerably higher. The details of such calculations are discussed by Spratling 'Fines in Criminal Antitrust Cases'.

192 Or the company by which they were employed. The minimum fine here is $20,000.

193 Eg price-fixing would receive 4-10 months sentence, bid-rigging 6-12 months. The imprisonment range increases with the volume of commerce involved. See McAnneny 'The Justice Department's Crusade' at pp 533-534.

194 A minimum fine of $100,000 is imposed. The calculation allows for various aggravating and mitigation factors to be taken into account. These will be discussed further below. Organisational defendants include corporations, trade associations, partnerships and unions.

195 Again, an alternative fine based on "twice the gain, twice the loss" may be levied.

196 Fines are now calculated on 1%-4% of the volume of trade. A $20,000 minimum fine still exists. Custodial sentences of 0-46 months may now be imposed. Price-fixing violations now attract a sentence of 18-24 months. See Spratling 'Fines in Criminal Antitrust Cases' at p 76 et seq.

197 In addition, no minimum fine is imposed. The calculations involved are discussed in more detail by Spratling 'Fines in Criminal Antitrust Cases' particularly at pp 81-85.

198 Eg career enhancement, bonuses etc. Discussed by Spratling 'Fines in Criminal Antitrust Cases' at p 80.

199 The latter factors raises the defendant's culpability score considerably. See discussion of the effect of aggravating factors in Spratling 'Fines in Criminal Antitrust Cases' at p 83.

200 Self reporting of the violation is also regarded as co-operative behaviour. See McAnneny 'The Justice Department's Crusade' at p 535 and Spratling 'Fines in Criminal Antitrust Cases' at p 84, for details of mitigating factors.

201 For further on 'just deserts' see Hudson *Justice Through Punishment* Macmillan (1987) ; Sanders and Young *Criminal Justice* Butterworths (1994).

202 Between 1890-1940, only one prison sentence was handed down. Eleven were imposed between 1940-1955. For early data on criminal and civil sanctions, see Elzinga and Breit *The Antitrust Penalties* (1976) ; Posner 'A Statistical Study of Antitrust Enforcement' *Jo Law and Economics* [1970] 365 and Flynn 'Criminal Sanctions Under State and Federal Antitrust Laws' *Texas LR* [1967] 1301.

203 Between 1955-1965, four ninety-day sentences were imposed in *US v McDonough Co* [1959] Trade Cas (CCH) No.69, 482 (S.D.Ohio) and seven thirty-day offences in the electrical equipment cases. From 1966-1974, ninety prison sentences were handed down, of which 75 were suspended. These cases and statistics are discussed in greater detail in Elzinga and Breit *The Antitrust Penalties* at pp 34-37.

204 From 1955-1974, the maximum fine was only imposed once as part of the electrical equipment fines. Although corporations could be fined a maximum of $50,000, the average corporation fine was only $13,000. On this, see Elzinga and Breit *The Antitrust Penalties* at pp 56-57 and Posner 'A Statistical Study of Antitrust Enforcement' at p 392.

[205] See Blair 'Antitrust Penalties' at pp 65-69. He recommends the introduction of legislation making certain penalties mandatory. Flynn in 'Criminal Sanctions Under State and Federal Antitrust Laws' at p 1333, suggests that an effective deterrent might be to bar individual antitrust offenders from corporate office.

[206] See Memo from Asst. AG Baker to Staff Attorneys and Economists (Feb 24, 1977), reprinted in Flynn *Antitrust Supplement: Selected Statutes and Related Materials* (1977) at pp 179-192 ; Rule 'Deterring Antitrust Crimes Through Stiffer Penalties' in *Antitrust Law* ABA Study Course, San Francisco (May 6, 1988).

[207] McAnneny 'The Justice Department's Crusade' at p 543, notes that the DOJ has been particularly successful from the outset in convincing the Sentencing Commission for the need to impose overtly deterrent sentences on antitrust violators.

[208] See McAnneny 'The Justice Department's Crusade' at p 524.

[209] Background information is derived from : Neale and Goyder *The Antitrust Laws of the USA* at pp 379-382 ; L.Sullivan *Law of Antitrust* at pp 757-759 ; McAnneny 'The Justice Department's Crusade' ; Handler 'The Shift from Substance to Procedural Innovations in Antitrust Suits - The 23rd Annual Antitrust Review' *Columbia LR* [1971] 17 ; Stark 'Transparency Policy of the Antitrust Division' ; Anderson 'Modifications of Antitrust Consent Decrees : Over a Double Barrel' *Mich LR* [1985] 134 ; Branfman 'Antitrust Consent Decrees - A Review and Evaluation of the First Seven Years under the APPA' *Antitrust Bulletin* [1982] 303 ; Johnson and Rupert 'US Antitrust Law'.

[210] See discussion by Neale and Goyder *The Antitrust Laws of the USA* at pp 379-382 ; L.Sullivan *Law of Antitrust* at pp 757-759.

[211] These issues are discussed by Spratling 'Fines in Criminal Antitrust Cases' at pp 84-87, who also notes that organisations may avoid prosecution under the DOJ's "amnesty programme". This will only occur where the party self reports its own violation and the violation was unknown to the DOJ and unlikely to be discovered in the near future.

[212] McAnneny 'The Justice Department's Crusade' at p 532, who explains that the DOJ takes this approach because guilty pleas can be used as prima facie evidence in private actions and the prospect of treble damages increases the deterrent value of enforcement.

[213] Branfman 'Antitrust Consent Decrees' ; Kauper 'The Use of Consent Decrees in American Antitrust Cases' in SLOT AND MCDONNNELL (Eds.) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 104 ; Anderson 'Modifications of Antitrust Consent Decrees'; L.Sullivan *Law of Antitrust* at pp 757-759 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 379-382 ; Handler 'Antitrust Myth and Reality in an Inflationary Era' 50 *NYULRev* [1975] 211.

[214] S.5(a) Clayton Act 1914 provides that any civil/criminal judgement may be used as prima facie evidence in a private suit. Occasionally, the DOJ has insisted upon an admission of guilt as part of a decree in order to facilitate private action eg *US v Allied Chemical Corp* 1961 Trade Cas (CCH) No.69,923 (D.Mass.1960). The advantages and disadvantages of consent decrees are reviewed by Kauper 'The Use of Consent Decrees' at pp 104-106.

[215] Primarily ss.15, 16 APPA.

[216] S.16(b) APPA. On occasion, the DOJ has refused to publish "determinative documents" claiming confidentiality, eg *US v Merck & Co* Civil Act. No.79 0962-T (S.D.Cal.1980). Here the DOJ managed to rely on the provisions of a previously issued protection order to evade this requirement. The process for the entry of decrees is critically reviewed by Branfman 'Antitrust Consent Decrees'.

[217] APPA s.16(b) The CIS must include a statement of the nature of the proceeding, a description of the alleged violation, an explanation of the decree and its effect on competition, a statement of the remedies available to private parties, a summary of the procedure for modification of the decree and a consideration of alternative solutions. The APPA also requires publication of a summary of the CD in newspapers. See Branfman 'Antitrust Consent Decrees' at pp 306-315.

[218] This provision is intended to reveal any 'lobbying' which may have taken place. This requirement is a direct response to criticism of the CD procedure prior to the passing of the APPA. These problems are discussed further below.

219 In *US v Central Contracting Co* 1982-1 Trade Cas (CCH) No.64,489 (E.D. va 1981), the Court refused to grant the decree without a full explanation for the defendant's lapse. Branfman's research revealed that in over 80% of defence disclosures no communication with other government departments was reported. Only three cases admitted some form of political contact. See Branfman 'Antitrust Consent Decrees' at pp 316-319.

220 Eg amicus participation, direct intervention in proceedings and instituting proceedings seeking a writ of mandamus.

221 Eg in *US v United Technologies Corp* 1980-81 Trade Cas (CCH) No.63,792 (ND.NY.1981) and the modifications in *AT & T* 552 F.Supp. 131 (DDC.1982), aff'd 460 USA 1001 (1983) were partially in response to third party influence. Branfman 'Antitrust Consent Decrees' at pp 329-341, reviews in detail the possibilities for, and effectiveness of, non-party influence.

222 S.16(c)(3) APPA.

223 The Court's public interest assessment is evaluated thoroughly by Branfman 'Antitrust Consent Decrees' at pp 324-328, 348-52 and by Kauper in 'The Use of Consent Decrees' at pp 111-112. Though as Kauper notes, the Court already possess the powers given to them under the Act.

224 Eg in *US v Hall Contracting Corp* Case No.78-0063. Branfman 'Antitrust Consent Decrees' at p 350, notes that courts tend to conclude that the DOJ's agreement with the CD is strong evidence that it serves the public interest. Kauper 'The Use of Consent Decrees' at p 112, is critical of the Court's assessment. However, some courts have taken a more activist stance eg *US v Gillette Co* 406 F.Supp. 713 (D.Mass.1975).

225 For a recent example of a simple decree prohibiting a practice, see *US v Burgstiner* 1991-1 Trade Cas (CCH) No.69,422 (S.D.Ga.) which prohibited exchange of price information. In *US v AT & T Co* 1982-2 Trade Cas (CCH) No.64,900 (D.D.C.), the Court imposed a number of additional regulatory requirements supervised by the Court. Sometimes, the decree may prohibit conduct which is not itself unlawful where it is necessary to prevent repetition. See eg *US v Massachusetts Allergy Soc Inc* 1992-1 Trade Cas (CCH) No.69,846 (D.Mass.), where the CD prohibited certain defendants, who were involved in the dissemination of fee schedules through the society, from holding office in the society for five years. The terms of consent decrees are discussed by Kauper 'The Use of Consent Decrees' at pp 106-108.

226 In *US v Illinois Podiatry Soc Inc* 1977-2 Trade Cas (CCH) No.61,707, this threat was employed to induce the defendants to modify the decree. In contrast, defendants have little bargaining power. This aspect will be discussed further below when defence rights at trial stage are evaluated.

227 Existing CDs could be modified or terminated but few were because the procedures involved were cumbersome. Modification of decrees is discussed by Anderson 'Modifications of Antitrust Consent Decrees'. In 1982, the DOJ began a formal programme of reviewing existing decrees (over 1300) and seeking modification or termination of those no longer required. By 1986, 50 such decrees had been vacated. See discussion in Kauper 'The Use of Consent Decrees' at p 107, n18.

228 Eg such 'boilerplate' provisions were imposed in *US v Massachusetts Allergy Soc Inc* 1992-1 Trade Cas (CCH) No.69,846 (D.Mass.). The DOJ tends to view such conditions as non-negotiable.

229 *US v ITT* 349 F.Supp. (D.Conn.1972) and *US v ITT* 1971 Trade Cas (CCH) No.73,665 (D.Conn.). It was asserted that the White House had pressurised the DOJ to accept the decrees because of financial contributions made to the Republican Party by ITT. This controversy formed part of the 'Watergate' scandal and is discussed in detail by Goolrick *Public Policy Toward Corporate Growth : The ITT Merger Cases* (1978) ; Kauper 'The Use of Consent Decrees' at pp 110-111. L.Sullivan *Law of Antitrust* at p 758 and Branfman 'Antitrust Consent Decrees' at pp 303-306, deal with the issue more briefly.

230 Branfman 'Antitrust Consent Decrees' at p 306, outlines the intentions of the APPA as intending to make explicit any strategic and policy considerations that went into the formulation of the decree, as well as any political pressure by defendants. Substantively, it was aimed at ensuring that the courts evaluated the public interest, rather than rubber-stamping the CD.

Handler in 'Antitrust Myth and Reality', expressed concern at the passing of the APPA asserting that it would be counter-productive and would undermine the effectiveness of antitrust law.

231 See eg Kauper 'The Use of Consent Decrees' at pp 110-112 ; Branfman 'Antitrust Consent Decrees' at pp 328,354.

232 Branfman 'Antitrust Consent Decrees' at p 328, considers that this is partly the result of an absence of objections in most cases and the prevailing judicial desire to affirm decrees.

233 The defendant is particularly vulnerable here, though the bureaucratic pressures on the DOJ may cause also it to accept unsuitable decrees in the interests of a speedy settlement. See Kauper 'The Use of Consent Decrees' at pp 111-112 ; L.Sullivan *Law of Antitrust* at p 758 and Branfman 'Antitrust Consent Decrees' at pp 341-342.

234 Branfman 'Antitrust Consent Decrees' at pp 316-317.

235 This explains, in particular, the limited effect of third parties on the content of decrees in general. In 30% of decrees in Branfman's study, objections were made. In only five cases did the judge refuse to enter the decree in the terms lodged, and in three of those cases, a modified decree was granted. See Branfman 'Antitrust Consent Decrees' at p 328. Judges have been particularly reluctant to allow direct intervention in cases eg *US v Carrols Development Corp* 454 F.Supp. 1215 (ND.NY.1978), cf *Cascade National Gas Corp v El Paso National Gas Co* 386 US 129 (1967), one of the few cases where intervention was allowed. These problems are assessed thoroughly by Branfman 'Antitrust Consent Decrees' at pp 329-348 and Kauper 'The Use of Consent Decrees' at pp 112-113.

236 In the first seven years of the APPA, no court took the testimony of an official or expert, appointed a consultant or sought the views of a third party - see Branfman 'Antitrust Consent Decrees' at p 327.

237 Kauper 'The Use of Consent Decrees' at p 112. See eg Rule 24(a)(2) F.R.Civ.P. which gives the Court powers to authorise third party intervention.

238 On this, see Kauper 'The Use of Consent Decrees' at p 112.

239 See Kauper 'The Use of Consent Decrees' at p 112. Branfman 'Antitrust Consent Decrees' at p 353, discloses that there is also evidence that the APPA has raised costs for the DOJ, in terms of publication and comment requirements and in manpowers costs and has imposed less quantifiable costs on defendants.

240 Branfman 'Antitrust Consent Decrees' at pp 353-354, cf Handler 'Antitrust Myth and Reality', discussed above.

241 Handler 'Antitrust Myth and Reality' at p 214, reports that between 1962-1974, an average of 68.7% of antitrust cases were settled by decree. Branfman 'Antitrust Consent Decrees' at pp 353-355, found that between 1978-1981, in an average of 70.9% cases, decrees were made. Kauper in 'The Use of Consent Decrees' at p 104, reports that, during the 1980s, 60% of civil cases were terminated by the issuance of a CD.

242 Issued Under Federal Register 2442 (1968).

243 A decision indicating no present intention to prosecute is known as a 'railroad release'. The use of BRLs is discussed by Stark 'Transparency Policy of the Antitrust Division' ; Johnson and Rupert 'US Antitrust Law' ; Neale and Goyder *The Antitrust Laws of the USA* at pp 379-382 and L.Sullivan *Law of Antitrust* at pp 757-759.

244 As yet, the DOJ has never initiated proceedings following a BRL where there has not been full disclosure.

245 This was particularly so under the lenient approach of the Reagan Administration. See discussion by Griffin 'Economic Rationality Alters US Antitrust Enforcement' and Johnson and Rupert 'US Antitrust Law'.

246 For further information on the FTC's informal settlements, see : Hobbs 'A Role for the FTC' ; Lingos 'Transparency of Proceedings' ; Neale and Goyder *The Antitrust Laws of the USA* at pp 389-392 ; L.Sullivan *Law of Antitrust* at pp 756-757.

247 Discussed further by Neale and Goyder *The Antitrust Laws of the USA* at pp 389-391 ; L.Sullivan *Law of Antitrust* at pp 756-757.

248 See Neale and Goyder *The Antitrust Laws of the USA* at pp 389-391 ; L.Sullivan *Law of Antitrust* at pp 756-757.

249 These opinions are similar to the DOJ's, BRLs and the EC Commission's comfort letters.

250 Nor will the FTC issue an opinion where extensive research is required. The conditions for the issuance of an advisory opinion are discussed by Lingos 'Transparency of Proceedings' at pp 206-207.

251 Before 1970, these opinions were only published in a summary, hypothetical format. Now, each advisory opinion is published in full, complete with the identity of the requesting party and a copy of the request. Discussed further by Lingos in 'Transparency of Proceedings' at pp 206-207, who assesses the transparency of FTC procedures.

252 On this, see Neale and Goyder *The Antitrust Laws of the USA* at pp 389-391 and Lingos 'Transparency of Proceedings' at p 208.

253 In the past, the FTC has given advisory opinions on a wide range of subjects including pricing policies, trade association activities and mergers.

254 These guides are issued under 16 CFR ss.1.5 and 1.6. Discussed by L.Sullivan *Law of Antitrust* at pp 757-759 and Neale and Goyder *The Antitrust Laws of the USA* at pp 389-391.

255 But, they are published in the Federal Register.

256 Eg the Commission's Enforcement Policy with Respect to Vertical Mergers in the Cement Industry and its Enforcement Policy Regarding Mergers in the Food Distribution Industry. Both of these guides are discussed further by Lingos 'Transparency of Proceedings' at pp 206-207.

257 Issued under 16 CFR s.1.12 following lengthy investigation, consultation and publication procedures. See L.Sullivan *Law of Antitrust* at p 756.

258 Such regulations have been used to regulate franchising. See discussion in Neale and Goyder *The Antitrust Laws of the USA* at pp 389-391.

259 Both L.Sullivan *Law of Antitrust* at p 753, and almost a decade later, Hobbs in 'A Role for the FTC' at p 473, criticise the Commission's case selection.

260 Cf *Moog Ind Inc v FTC* 355 US 411, 78 S.Ct. 377, 2 L.Ed.2d 370 (1958), where the Supreme Court stressed the breadth of the Commission's discretion, with *Indiana Federation of Dentists v FTC* 101 FTC 425 (1983), rev'd 745 F.2d 1124 (7th Circ 1984), petn. for cert. granted 88 L.Ed.2d 224 (October 14, 1985), where the Court of Appeals refused to uphold the FTC's exercise of discretion. These issues are discussed by Hobbs 'A Role for the FTC' at pp 461-465.

261 See Hobbs 'A Role for the FTC' at pp 470-472, who asserts that this return to a business guidance approach to enforcement will do much to encourage greater voluntary compliance and restore lost confidence in the FTC.

262 For background information on defence rights, see : Kauper 'The Use of Consent Decrees' ; Baker 'Investigation and Proof of an Antitrust Violation' ; Stark 'Transparency Policy of the Antitrust Division' ; Lingos 'Transparency of Proceedings' ; Branfman 'Antitrust Consent Decrees' ; Hawk 'The American Antitrust Revolution' ; Kingdon 'Economic Argument in Antitrust Cases'.

263 See Kingdon 'Economic Argument in Antitrust Cases' at pp 379-381.

264 Hawk in 'The American Antitrust Revolution' at pp 63-64, has pointed out that the FTC's final decision is made by the Commission who are political appointees and is dominated by policy considerations. Lingos 'Transparency of Proceedings' at pp 204-205, 212, would disagree, insisting upon the institutionalised transparency of FTC proceedings.

265 This applies to defendants in both DOJ and FTC cases. Ultimately, review by the Supreme Court is possible, though the Supreme Court are extremely selective about which cases it chooses

to review. On this, see L.Sullivan *Law of Antitrust* at p 768. Appeal possibilities are also discussed by Baker 'Investigation and Proof of an Antitrust Violation' at pp 150-153.

266 Usually findings of fact by a jury, district judge or the FTC are accepted as final. Discussed by Baker 'Investigation and Proof of an Antitrust Violation' at p 158. See also his comments at p 152, where he discusses criminal appeals.

267 Specifically, such matters as the allocation of the burden of proof on important issues.

268 The Court of Appeals approach in *FTC v Indiana Federation of Dentists* 476 US 447, 454 (1986) is typical of its less deferential attitude towards the FTC. Discussed by Baker 'Investigation and Proof of an Antitrust Violation' at pp 156-158 and Hobbs 'A Role for the FTC' at pp 461-465.

269 Branfman 'Antitrust Consent Decrees' at pp 341-342. Cf Lingos 'Transparency of Proceedings' at p 203, who asserts that the transparency of FTC informal proceedings offers defendants considerable protection. In *US v Illinois Podiatry Society Inc* 1977-2 Trade Cas (CCH) No.61,707, the DOJ used the threat of litigation to exert pressure to settle on the defendant. However, in *US v Stewart Mechanical Ent Inc* 1979-2 Trade Cas (CCH) No.62,904, the defendant was able to induce modification.

270 Though whether judges, given the non-interventionist stance of courts, would be prepared to become involved is another matter. See Branfman 'Antitrust Consent Decrees' at pp 341-342 and Kauper 'The Use of Consent Decrees' at pp 110-112.

271 See Ch8 supra for discussion of legal value of comfort letters.

CHAPTER ELEVEN

THE REALITY OF ANTITRUST

"We shall not cease from exploration.
And the end of all our exploring,
Will be to arrive where we started,
And know the place for the first time." [1]

A)INTRODUCTION

The central theme of this critical investigation of the process and substance of Commission decision-making has been the effect of political and pragmatic goals on both the classification and application of competition rules and 'rule of law' principles. Specifically, the study has focused on the classification of antitrust offences and the impact of this characterisation on enforcement choices and defence rights. It is now apposite to summarise the findings of the research, comparing and contrasting the approaches of both jurisdictions under examination. The current consequences and future implications of their respective attitudes to antitrust enforcement will then be considered. In order to highlight the role of political and pragmatic aims as the fulcrum of antitrust enforcement, the following sections will outline in turn the effect of these objectives on each aspect of the study. During the course of this discussion, it is hoped to provide some answers to the questions posed at the this beginning of the research.

B)THE IMPACT OF 'POLITICS AND PRAGMATISM' ON THE CLASSIFICATION AND APPLICATION OF COMPETITION RULES

This research has demonstrated that there is clear and repeated proof that political and pragmatic goals dominate all aspects of enforcement. This is so in both jurisdictions under consideration. These goals impact upon enforcement in a number of ways.

Firstly, political and pragmatic needs determine the definition and classification of anti-competitive conduct. Secondly, these objectives influence enforcement choices, specifically the nature, scope and use of enforcement powers and defence rights. Finally, these goals affect the choice of enforcement method employed. Each of these aspects will be examined in further detail below, considering their impact in both the EC and US.

1)Definition and Classification of Anti-Competitive Conduct

a)EC

The study has revealed that political and pragmatic aims have a major impact on the constitution and subsequent classification of anti-competitive conduct. The imperative and far-reaching nature of these objectives requires that the Commission gains control over the widest possible range of business conduct within the EC. Initially, it does this by using its discretion and the generous drafting of Art.85 to construct a definition of anti-competitive conduct which suits its own needs and brings potential threats to these goals within DGIV's purview. Consequently, under political and pragmatic influences, anti-competitive conduct is behaviour which hinders the attainment of these ends. The impact of these objectives on competition enforcement is immediate. What constitutes anti-competitive behaviour in the EC depends not on whether the practice restricts competition, but whether it threatens political and pragmatic objectives. Admittedly, the needs of these goals and competition may coincide. But, this is not necessarily so. Where their interests do conflict, the Commission has made it clear that the needs of the competitive process will be subordinated to those of 'politics and pragmatism'. This is no better illustrated than in DGIV's economically questionable evaluation of the pro/anti-competitive effects of distribution arrangements.

These goals also impact upon the characterisation of anti-competitive behaviour. Broadly, the greater the menace to political and pragmatic aims, the more

penal DGIV's classification of the conduct. The nexus between these factors and characterisation was clearly evidenced in the study. Under these goals, most horizontal cartels and export bans in vertical agreements are perceived as particularly harmful because of the direct threat they pose to economic integration. As the Commission's prime objective is to eradicate such threats, many arrangements in the study were routinely viewed as per se criminal violations. DGIV's antipathy to these practices was disclosed by the frequent and stern references in Commission decisions to the gravity, the deliberate nature and the threat to economic unity that the behaviour posed.

Whilst the focus on political and pragmatic needs means that most anti-competitive conduct receives a criminal characterisation, this is apparently not always the case. From the Commission's treatment of negatively cleared and individually exempted vertical cases in the study, such arrangements appear to be classed as administrative matters. Though, as already noted, this characterisation appears to owe more to DGIV's arbitrary exercise of discretion than an absence of restrictive content in these agreements. More to the point, distribution agreements' ability to aid market integration and the negotiated nature of these cases promotes the political and pragmatic aims, thus affecting their apparent classification.

The breadth of the Commission's discretion is felt even at this early stage, allowing DGIV to control what conduct is anti-competitive and the subsequent characterisation of that behaviour. The full extent of the benefits to political and pragmatic aims, accruing from DGIV's choices and classification of anti-competitive conduct, are revealed in its subsequent application of competition rules.

b)US

Here too, political and pragmatic goals impact upon the definition and characterisation of anti-competitive behaviour [2]. Like Art.85, both the Sherman and FTC Acts are sufficiently broadly drafted to allow US enforcement agencies to interpret those rules in accordance with their current perceptions of restrictive conduct and bring politically

and pragmatically threatening behaviour within their control. Specifically, political needs have been a major force shaping the US definition of anti-competitive conduct. In recent decades, the prevailing politico-economic ideology has been committed to maximising business freedom. This has affected the types of conduct regarded as undesirable. In particular, some forms of vertical arrangement are no longer regarded as restrictive practices. Thus, once again, there is evidence that political and pragmatic aims have an immediate impact on antitrust enforcement and that, from the outset, that influence places enforcement on the basis of political expediency rather than merit.

Political attitudes also have a striking influence on the characterisation of anti-competitive conduct in the US. Again, the greater the threat to political goals, the more penal the classification of the behaviour. This nexus is particularly clear in the US. The economic power wielded by major horizontal cartels has long been seen as a grave threat to political power in the US. Such politically dangerous agreements are automatically given a per se criminal classification. In contrast, current political beliefs see many vertical arrangements, and even some horizontal agreements, as more acceptable conduct. Accordingly, they have been characterised as administrative, rule of reason matters.

Thus, like the EC, the discretionary choices of US enforcement agencies reveal that, from the very outset, political and pragmatic aims exert considerable control over both the definition and classification of anti-competitive conduct. Subsequent events illustrate the far-reaching impact of these initial choices on the conduct of enforcement.

It is clear from this summary that political goals are most influential at this point. In the EC, the aim of economic integration, and in the US, the broader politico-economic desire to maximise business freedom dominates decision-making and drives the initial definition and classification of anti-competitive conduct. As already noted, the full impact of these early decisions is revealed in the subsequent application of competition rules.

2)Enforcement Choices

Not only do political and pragmatic aims have a significant effect upon the definition and characterisation of anti-competitive behaviour, they also impact upon enforcement choices, particularly the construction and application of enforcement powers and defence rights. The research has revealed that the need to secure these goals drives enforcement agencies to dominate the process. This necessarily impacts upon the classification, scope and use of enforcement powers and defence rights. This study has demonstrated that this approach is based on the incremental use of the 'law as a resource' for political and pragmatic ends. Under this approach, every enforcement action, decision and opportunity is constructed and employed to facilitate and/or justify the next step in the process, and therefore, the ultimate attainment of political and pragmatic goals. Step by step, these choices seek to secure the conviction and punishment of all conduct threatening these objectives. For many, the result is an inexorable progress towards an inevitable conclusion : conviction.

DGIV, in particular, has two favoured tactics. The first is the creation of disparity between itself and others, principally the defendant, in the process. The other is the creation of legal uncertainty and the exploitation of the resulting flexibility of the law. The study has revealed that the inherent malleability of the law provides the Commission with the opportunity to apply its monolithic discretion to significant political and pragmatic advantage. At every point, there is evidence that DGIV uses this freedom to manipulate the character and scope of its own powers and defence rights to create an imbalance between the two. Moreover, the research bears evidence of numerous instances which suggest that this dominance of enforcement is also employed by DGIV to pursue a concerted policy of creating and maintaining ambiguity over a wide range of enforcement issues. Both tactics provide DGIV with considerable room to manoeuvre, enabling it to use the 'law as a resource' to meet current political and pragmatic demands, yet still remain within the parameters of the law. Both strategies serve to create difficulties in challenging the Commission's activities. Others in the process are simply unable to question or review DGIV's

conduct effectively, so permitting DGIV's version of enforcement to proceed to its conclusion largely unhindered. Overall, both techniques play a significant role in maintaining the prosecution momentum, invariably tipping the scales in favour of conviction.

Under this incremental approach, the 'politics and pragmatism' rationale is employed at every point to justify this use of the 'law as a resource'. At every point, the benefit of these tactics to political and pragmatic aims is evident. At every point, the resulting control of the process ensures enforcement in line with current political and pragmatic requirements.

It is not only the Commission who employs such tactics. The study has also demonstrated that this same incremental use of the 'law as a resource' for political and pragmatic ends is apparent in the US. The following sections summarise the influence of, and the advantages to, political and pragmatic goals of these incremental tactics at each stage of the process in both the EC and US.

a)Investigation - EC

DGIV's approach to the investigation of horizontal cartels sets the tenor of its entire enforcement policy [3]. The paramouncy of Reg.17 is assured by the Commission's repeated insistence that it has the exclusive ability to decide and control all aspects of enforcement. To this end, it manipulates relevant legal definitions and concepts to maximise its own fact-finding powers, whilst restricting those of defendants. The result is that DGIV possesses investigatory powers which are penal in nature, scope and application. In particular, its insistence upon its freedom of choice regarding investigation methods has resulted in an approach which maximises enforcement powers, whilst ensuring that there is no immediate check upon them. Specifically, DGIV's routine resort to Art.14(3) reveals its perception of the criminality of anti-competitive practices and its willingness to punish non-cooperation.

Similarly, the Commission's interpretation of defence rights reveals its reluctance to brook any interference with effective enforcement [4]. As a result, DGIV

repeatedly resolves the inherent conflict between the needs of Reg.17 and the obligation to uphold due process by limiting both the classification and scope of defence rights. Its broad approach is to characterise defence protections as administrative by basing them on the highly flexible concept of 'integral fairness'. This provides the Commission with the ability to construct and reconstruct defence protections in a way which serves current enforcement demands, yet pays some formal recognition to due process. There is no better example of this than the right to silence where DGIV's wide interpretation of the defendant's duty to co-operate and its willingness to employ Reg.17 punitively by fining the defendant's reluctance to incriminate himself, effectively secures the defendant's active participation in his own conviction.

The nature and effectiveness of other fundamental rights such as legal representation and legal professional privilege are similarly interpreted and curtailed to meet enforcement demands.

DGIV's investigation of vertical cases portrays the same approach [5]. The notable reluctance of defendants in these cases to confront the Commission means that DGIV is not generally required to employ Reg.17 in an overtly penal manner in vertical arrangements. But, the classification, scope and disparity between DGIV's powers and defence rights persists unchanged. Where necessary, the Commission continues to exercise enforcement powers punitively to maintain the supremacy of Reg.17 and the attainment of political and pragmatic aims.

It is evident from the above that the Commission fully exploits the malleability of legal rules to meet investigation demands and thereby secure political and pragmatic objectives. DGIV's primary tactic is to rely on the extensive discretion guaranteed by its monolithic position to ensure that enforcement and due process are on its terms. As a result, defence rights are permitted only insofar as they do not hinder enforcement and the attainment of the political and pragmatic goals. Indeed, fundamental rights are invariably defined to assist conviction. The limited effectiveness of defence protections means that DGIV's penal powers are bounded by few real controls, enabling it to secure and maintain control of all enforcement issues.

The Commission's investigation choices further political and pragmatic objectives in several respects. As well as providing a deterrent to actual and potential violators, DGIV's punitive approach has the political advantage of providing high visibilty enforcement. Moreover, at investigation, Art.8 ECHR's inviolability guarantee was interpreted as being limited by the political goal of "economic well-being", providing an explicit indication that, for DGIV, Art.3(g)'s goal of economic integration overrides fundamental rights. Finally, the disparity between prosecution and defence positions benefits political and pragmatic objectives by increasing conviction prospects considerably. The more extensive the Commission's powers and the weaker defendants' safeguards, the more cost-effective and certain the outcome of the process and the more successful the attainment of political and pragmatic goals.

b)Investigation - US

The examination of the nature and scope of US antitrust investigations reveals equally familiar enforcement tactics [6]. From the outset, both the DOJ and the FTC exert their dominance over the process. Both use it to exploit the flexibility of the law and maximise their own powers and meet enforcement demands. So, regardless of the initial classification of these powers, both agencies possess a formidable array of investigation powers which are penal in character, scope and application. At this point, the US and EC positions may be contrasted. Whilst the FTC and DGIV are both administrative agencies exercising penal powers, the FTC's ability to compel sworn testimony extends the range of its fact-finding skills beyond those of DGIV. The same is true of the DOJ's investigation tools. In particular, its use of body wires, telephone monitoring and grand juries are indicative of its intention to construe and apply its powers with maximum penality in favour of antitrust enforcement. The routine employment of grand juries is of immense enforcement value. Not only does it significantly enhance the Department's fact-finding ability, but it places proceedings entirely under the DOJ's control. The absence of immediate supervision over the Division allows it to set the prosecution momentum in motion and so take the first

step towards increasing the likelihood of conviction. Moreover, like the EC, US powers of investigation are exercised in the absence of effective procedural controls. The prosecution's mastery of the process and the breadth of procedural requirements means that, even the formal litigation context of the DOJ's powers, fails to exert telling control over investigation choices. Methods of fact-finding are not constrained ; possible avenues of abuse are not curtailed, allowing the prosecution to take another step towards its goal of conviction whilst evading immediate scrutiny. The United States' impressive investigation powers are supported by extensive sanctions. Not only may they, like the EC, fine non-cooperation, but they may also impose custodial sentences. This punitive approach both ensures the defendant's deference to the prosecution's enforcement choices and highlights again the jurisdiction's determination to pursue an overtly penal antitrust policy.

Like the EC, the US takes steps to curtail the effectiveness of defence rights and, where possible, employs them to assist conviction. Thus, whilst defence rights of silence and confidentiality are recognised, the restrictive interpretation placed on them by the prosecution and Court and the frequent resort to use immunity orders allows prosecutors to routinely override these protections. In particular, prosecutors exploit the adversarial bargaining surrounding these orders to assist conviction. By pitting defendants against one another, prosecutors invariably acquire considerable additional evidence at no cost to themselves. Thus, like the EC, the prosecution's mastery of the process, its ability and willingness to interpret defence rights in its own interests and the constant threat of punitive sanctions for non-cooperation all render defence safeguards meaningless. In reality, defendants have litte option but to accede to prosecution demands taking the prosecution another step towards its goal. This co-opting of defendants significantly enhances conviction prospects. It both enables the prosecution to acquire ample evidence upon which to convict, whilst rendering defendants unwilling and unable to challenge the prosecution's construction of enforcement.

In summary, two points must be emphasised. In the US, every opportunity is taken to reinforce the punitive nature of antitrust enforcement. As a result, in both

scope and application, the penality of US investigation powers extends beyond even that of the EC's. Secondly, the US employs identical enforcement tactics to those of DGIV's with identical goals in mind. Once again, the prosecution dominates enforcement. Once again, enforcement powers are maximised and defence rights curtailed. Once again, the disparity in effectiveness between the two is exploited to ensure the paramouncy of enforcement demands.

c)Prosecution - EC

The same pattern of Commission dominance and subordination of defendants is revealed at prosecution [7]. Here, it has been demonstrated that, in pursuit of political and pragmatic goals, DGIV uses the 'law as a resource' to construct a case which is difficult for the defendant to disprove. The study has shown that case construction has three main facets. In each case, it has been revealed that the criminal classification, in other words political and pragmatic aims, dictate and justify DGIV's prosecution choices. Firstly, the Commission interprets the ambit of Art.85 to criminalise conduct and bring it within its remit [8]. To this end, it has developed several concepts such as 'collective responsibility' and 'complex infringement'. The breadth of these notions considerably enhances DGIV's powers by expediting the substantiation of an offence. In this respect, DGIV has undertaken a deliberate policy of creating ambiguity regarding the scope of these concepts, thus making it difficult to challenge the Commission's case construction. These notions serve to increase the criminality of the offence and justify DGIV's choices in the second aspect of case construction ; the type of analytical format employed. Here, the Commission uses its absolute freedom over the type and depth of legal and economic analysis employed, to choose to undertake only a limited evaluation of the agreement. This approach has been criticised as shallow, but it does have political and pragmatic advantages. Its routine employment allows the speedy prosecution of politically damaging cartels without requiring the expenditure of resources to establish anti-competitive effect.

In turn, DGIV's choice of the 'object' format of analysis, combined with the absence of stringent evidential rules, have a significant impact upon the final strand of case construction ; the quality and quantity of evidence necessary to substantiate an antitrust violation. The combination of the two provides DGIV with the freedom to control all aspects of evidential sufficiency in the best interests of 'politics and pragmatism'. Consequently, these objectives affect the quality of evidence employed by dictating an extensive reliance on circumstantial evidence and a widespread rejection of economic evidence. Similarly, their impact upon the quantity of evidence has resulted in the continued absence of a clear burden and standard of proof. DGIV's use of the 'law as a resource' here, specifically, its focus on the anti-competitive object, the cumulative weight of evidence and the perpetuation of uncertainty regarding the requirements of proof, allow DGIV to mask any evidential insufficiency resulting from its politically and pragmatically necessary choices. This approach has raised concerns that it allows the sum of the evidence to outweigh the whole and thereby permits the Commission to 'convict' on evidence which on closer examination is insufficient or unreliable. But, the policy nevertheless permits political and pragmatic goals to control evidential sufficiency, masking problems of proof and enhancing conviction prospects considerably.

DGIV's attitude to the defendant's right of access at prosecution reveals a familiar approach under which the Commission's domination of the process allows it to control the characterisation and scope of disclosure rights and limit them to meet political and pragmatic demands [9]. Consequently, despite caselaw to the contrary, the fundamental nature of this safeguard is routinely denied. Access is merely a privilege permitted by the Commission in the interests of 'fair play'. Its scope is similarly curtailed, initially, by DGIV's formalistic insistence that due process obligations have been discharged by the issuance of the SO. DGIV takes addititonal steps to ensure that the ambit of this protection is defined in a way which restricts the opportunity for, and the effectiveness of, the defendant's right to comment. Principally, this is achieved by controlling both the issues of 'confidentiality' and 'relevancy'. Here, DGIV employs its favoured tactic of constructing such issues in an uncertain fashion. This provides

the Commission with flexible tools with which to manipulate the quality and quantity of evidence available to defendants in accordance with political and pragmatic demands [10]. Together with the high burden of proof faced by defendants in establishing that DGIV has abused its position and suppressed vital information, this approach is capable of withholding much exculpatory evidence from defendants. Restricting access in this manner has proved a major asset to DGIV's attainment of political and pragmatic goals. Quite simply, selective disclosure constrains the effectiveness of the right to comment by rendering the formulation of a convincing defence problematic, and altering the balance of evidence in favour of political and pragmatic needs. In this way, due process is co-opted to achieve smooth, effective prosecution. The nexus between this approach and political and pragmatic objectives operates undenied. Indeed, DGIV has openly stated that unabridged defence rights to access are administratively unacceptable. Elsewhere, the political need for the paramouncy of Reg.17 has been affirmed time and again.

A broadly similar approach to case construction is seen in the Commission's formal prosecution of vertical cases in the study [11]. Again, it uses the tactic of extending definitions [12] and creating uncertainty [13], combined with a formalistic evaluation of arrangements, to secure and maintain control over the scope, application and proof of Art.85 violations. The flexibilty of this technique is particularly politically and pragmatically advantageous in the context of vertical agreements. Here, some arrangements directly conflict with market integration whilst others actively assist it. Thus, this approach allows DGIV to prosecute uncompromisingly cases which threaten unity, whilst showing leniency where appropriate. DGIV's construction of the characterisation and ambit of defence rights in vertical cases is equally similar [14]. Specifically, the same techniques are used to limit the effectiveness of the right to comment. The narrow interpretation of 'relevancy', the withholding of information as 'confidential' and the vagueness of the SO are again employed to distort the balance of evidence. This both makes the scope and strength of the case against the defendant unclear, whilst reducing the effectiveness of the defendant's right to comment. Inevitably, this facilitates prosecution and hinders defence.

Thus, the mismatch between Commission and defence positions continues throughout prosecution stage. The disparity created by DGIV's penal prosecution powers and the defendant's curtailed protections allows DGIV to set the prosecution agenda, making enforcement choices which serve political and pragmatic ends and co-opting defence rights to this end. Ultimately, this control is employed to construct a case which avoids problematic, resource consuming analysis and proof and ensures the cost-efficient and certain conviction of politically dangerous conduct.

d)Prosecution - US

The discussion of the EC's prosecution stage concentrated on the Commission's case construction. The litigation setting of US enforcement means that some of this case construction takes at prosecution stage, whilst the remainder occurs at trial. This section will summarise the research's findings on the initial stage of case construction, considering the impact of political and pragmatic goals on prosecutorial discretion.

The study has shown that both US agencies enjoy extensive discretion regarding whether and how to prosecute [15]. Some familiar patterns are evident. Above all, the research illustrates that enforcement agencies continue to dominate issues and that the absence of strict controls on prosecutorial decision-making allows enforcers' discretion to be exercised in favour of political and pragmatic needs. The earlier discussion on the definition of anti-competitive conduct has already highlighted the strong political influence which pervades the decision whether to prosecute. The breadth of antitrust legislation means that enforcement agencies are able to interpret and extend the substantive elements of the law to bring politically and pragmatically damaging conduct within their control and so take the first steps towards constructing a case against the defendant. The breadth and non-binding nature of prosecutorial guidance ensures that enforcers' perceptions alone dominate these prosecution decisions.

At prosecution, US defendants are significantly better protected than their EC counterparts. The litigation setting of US antitrust means that defendants here enjoy

broad, substantive rights of discovery. As a result, there is much greater 'equality of arms' in the US context. The research has revealed that some possibilities do exist for the prosecution to manipulate defence rights to serve enforcement. For instance, what constitutes exculpatory evidence is open to interpretation and therefore manipulation, providing prosecutors with an opportunity to withold evidence. However, these potential problems are counterbalanced by the litigation setting of enforcement. Most importantly, the nature and scope of defence safeguards are not at the discretion of the enforcing agency. Disputes are settled by an independent arbiter. Moreover, the litigation setting allows defendants to negotiate with prosecutors and influence decision-making. Such factors appreciably reduce the prosecutor's ability to manipulate the quality and quantity of evidence available to defendants. They also provide defendants with some degree of control over events, enhancing the level of protection afforded to them.

So, US enforcement agencies continue to dominate proceedings with prosecution powers which are clearly criminal in extent and application. The degree of political influence on this stage of decision-making is enormous and concern has been expressed. The changing political persuasion of the governing Administration inevitably affects the current perception of what is politically acceptable, altering the focus of enforcement and producing long-term confusion and inconsistency. Nevertheless, the approach has been shown to possess more immediate political and pragmatic benefits. It allows these objectives to inform all aspects of prosecutorial decision-making, controlling legal and economic standards and enabling the initial steps of politically expedient case construction and prosecution to be taken. Fortunately, defence safeguards at this stage are also considerable. Defendants both know the case against them and are able to acquire sufficient information to exercise their right to comment effectively. Clearly, at prosecution, there is an appreciably greater equality between prosecutors and defendants than in the EC.

e)Trial and Sentence - EC

Here too, DGIV has garnered wide powers to decide upon and punish cases of anti-competitive conduct [16]. At trial, its monolithic role enables it to construct, and then decide upon, the probative value of the case against the defendant. Rarely does the Commission decide against itself [17]. In addition, DGIV's fining power is enormous. Its exercise is based on little precise guidance, leaving the Commission free to decide the choice and weight of aggravating and mitigating factors to be considered in the fining assessment. Even less explanation of how it arrived at the final level of penalty is provided. The study has argued that DGIV's failure to articulate its reasoning is a further example of its deliberate cultivation of uncertainty as a means of increasing the nature, scope and flexibilty of its sanctioning powers for political and pragmatic advantage. The approach certainly leaves it with sanctioning powers which are penal in scope and whose ambiguous exercise makes any accountability problematic. DGIV uses these penal powers to their fullest extent. At both trial and sentence, they are employed to reinforce the criminality of the offence and justify the imposition of punitive sanctions. DGIV's criminal classification of infringements and its case construction have been of considerable assistance here. Both serve to augment the criminality of the violation and therefore increase both conviction prospects and the ultimate amount of fine levied. The inconsistent results produced by this approach have raised concerns that the outcome of the fining assessment owes more to DGIV's perceptions of criminality, which of course are inextricably linked to political and pragmatic goals, than to an objective legal and econiomic evaluation of the conduct. However, the decisions and fines imposed upon undertakings do serve to to exert a serious long-term effect over firms disclosing that, despite Reg.17's assertions to the contrary, DGIV's fining powers are criminal in nature, scope and application.

In contrast, defence rights are again subordinated to enforcement requirements [18]. The Commission's continued dominance allows it to relegate the defendant's safeguard to an independent tribunal to a matter of procedural fairness, enabling DGIV to act as arbiter of its own prosecutions. The Court's frequent

deference to DGIV means that it routinely prosecutes and convicts in the absence of exacting review. Defendants are left with no alternative but to submit to the Commission's monolithic discretion. The nature and ambit of the defendant's right to comment is similarly limited. The study has shown that DGIV employs its control of enforcement to ensure that other actors in the process do not interfere with its construction of conviction [19]. Their elimination as effective avenues of accountability allows the Commission to isolate defendants and exercise exclusive control over the width and effectiveness of the defendant's right to comment. In their absence, DGIV exerts its influence, where necessary, to alter the characterisation of violations during the course of proceedings to meet enforcement needs, safe in the knowledge that the breadth of Art.190 regularly fails to curtail its monlithic decision-making. Combined with earlier limitations upon access rights, this approach may render the defendant's right to comment worthless. Thus, at trial, the Commission's policy of constructing defence protections for its benfit rather than the defendant's is again illustrated. Whilst such an approach seriously hampers defendants, it does allow DGIV to formally acknowledge procedural fairness whilst meeting its enforcement demands unhindered by the substance of due process.

Sanctioning decisions in vertical cases provide further evidence of the penal character and scope of DGIV's powers [20]. The Commission's choices continue to exercise long-term control over firms and are specifically designed to eradicate threats to the political goal of economic unity. Again, DGIV's criminal/quasi-criminal classification, case construction and formalistic analysis of formally prosecuted vertical arrangements all serve as vital tools in heightening the criminality of violations and so justifying conviction and punitive sanctioning. Similarly, DGIV continues to control and limit the nature and effectiveness of defence protections at trial [21]. Its interpretation of the defendant's right to comment and to an independent tribunal not only affords defendants little protection, but may be constructed to pose a significant threat to defendants thereby tipping the scales in favour of conviction. This co-option of defence rights is facilitated in vertical cases by the virtual absence of defence challenges to DGIV's construction of respective rights and powers.

Thus, at trial, DGIV exploits its continued domination of the process to preserve the existing disparity between itself and defendants. The research has shown that to this end, DGIV has secured for itself decision-making and sanctioning powers which are entirely punitive in scope and application. Moreover, its supremacy permits DGIV to emasculate, and often co-opt, defence rights and to ignore the opinions of other actors in the process, leaving the defendant isolated and largely unprotected. As a result, the Commission's construction of conviction goes unchallenged ; its pursuit of political and pragmatic aims unimpeded. The resulting penality of this policy provides a powerful deterrent with which to secure economic and political unity.

f) Trial and Sentence - US

Like the EC, US enforcement agencies at this stage exercise extensive penal discretion [22]. These powers are directed towards constructing a case where conviction is difficult to avoid. Their principal tools and approach to case constrution are identical to the EC's [23]. The creation of uncertainty and the exploitation of the resulting flexibility are employed to exert exclusive control over all aspects of case construction. Thus, whilst this chapter has already noted a broad nexus between characterisation and analytical format, the study has also revealed that the law remains sufficiently malleable for the selection of analytical format in a given case to be ambiguous and at the discretion of the prosecutor and Court. Moreover, the inherent flexibilty of both the per se and the rule of reason approaches and the concepts involved are open to interpretation and can be constructed to boost evidential sufficiency and meet enforcement demands. Nevertheless, classification has a major impact on the proof of a violation with concomitant political and pragmatic benefits. The study has shown that whichever analytical approach is chosen, it has a direct impact upon the quality and quantity of evidence required to substantiate an offence. Per se evaluation, like the EC's 'object' analysis, relies on circumstantial evidence, superficial analysis and the cumulative weight of evidence to boost evidential sufficiency. Its selection benefits enforcement enormously. The minimal evidential requirements of this format make the

prosecution's case appreciably easier to prove. The selection of the rule of reason approach has its own advantages. This format's assessment of market context exploits the malleability of economic evidence and the uncertainty over the definition and evidential requirements of vertical offences to control the requirements of proof. The overall uncertainty regarding the selection and scope of analytical format also benefits political and pragmatic aims. Which format will be employed, what constitutes adequate proof under each approach and the reliability of that proof in any given case have been the subject of wide ranging confusion and acrimonious debate. The creation of amibiguity over the analysis and proof of US antitrust cases has been of immense advantage to prosecutors, permitting proof of an antitrust violation to be moulded to current enforcement needs, thus enhancing conviction prospects. The nexus between political and pragmatic goals and these case construction choices is clear. The definition, analysis and evidential standards in US antitrust cases have been demonstrated to be susceptible to a wide range of overt and covert political influences. Significant pragmatic benefits also accrue. The selection of analytical format, particularly the superficial per se approach, and the manipulation of evidential requirements provide a quick, cheap and certain route to conviction.

Like the EC, the culmination of the US process results in extremely punitive sanctions. Both criminal and civil sanctioning powers are undisputedly penal in nature, scope and application enabling the respective enforcement agencies to effect the desired long-term consequences upon antitrust violators. Whilst Sentencing Guidelines exert some control over factors influencing sanction and the ultimate level of sanction imposed in criminal cases, much is left to the discretion of the prosecutor and Court. This current approach discloses a desire to impose maximum sanctions at every opportunity. Again, political and pragmatic goals impact. The study has shown that this punitive policy is a direct response to political requirements. The influence of pragmatism is explicit in the Sentencing Guidelines which contain a clear mandate to reward co-operation which reduces enforcement costs.

The litigation setting of formal enforcement means that US defendants enjoy substantive rights to comment and to an independent tribunal. Neither the existence

nor scope of these safeguards is at the discretion of the enforcing agency, considerably reducing the disparity between prosecution powers and defence rights. But, political and pragmatic needs still have an impact. There is evidence to suggest that the political persuasion of the judge in DOJ cases and the monolithic role of the FTC may impair the independence of the deciding tribunal.

This final enforcement stage sees the prosecution's continued dominance coming to fruition. The entire process is geared to acquiring and maintaining long-term regulation of US business conduct. Here, the strong probability of conviction and subsequent punitive sanctioning achieve just that.

This review has demonstrated the immense impact of both political and pragmatic objectives on enforcement choices. Equally clear is the immeasurable value of the incremental use of the 'law as a resource' in securing the high visibility prosecution and conviction of politically and pragmatically damaging conduct. The legal techniques employed ensure that this is done in the most cost-effective and conviction-sure manner. Similar tactics are employed in both jurisdictions. Above all, at the insistence of political and pragmatic needs, the classification and scope of prosecution powers and defence safeguards are constructed in such a way as to increase enforcement powers, whilst curtailing defendants' protections. In this way, the prosecution's domination of enforcement and the attainment of political and pragmatic objectives are assured. As a result, some disparity between prosecution and defence positions is apparent in both jurisdictions, though the imbalance between the respective parties in the EC is notably more marked than in the US. In this respect, it is apparent that the structure of the system in the US, ie the litigation setting, gives significantly more stability to the defendant's position, resulting in considerably fewer disputes and problems over defence protections. Nevertheless, competition authorities in this jurisdiction continue to do everything in their power to maximise their domination of the enforcement process in the interests of political and pragmatic aims. Futhermore, both systems take every opportunity to augment and utilise legal uncertainty to meet political and pragmatic demands.

The 'politics and pragmatism' rationale not only affects the characterisation and ambit of powers and safeguards, but it also impacts upon the application of competition rules. Again, the nexus with political and pragmatic goals is clear. Both jurisdictions repeatedly refer to these objectives as justification for their enforcement choices. As a result, enforcement powers are classified, constructed and applied penally, regardless of their nominal characterisation. Quite simply, all enforcement choices are at the behest and for the benefit of political and pragmatic goals.

3)Methods of Enforcement

A further way in which political and pragmatic needs affect the application of competition rules is in a jurisdiction's choice of enforcement method. It has been seen that both jurisdictions possess several approaches to enforcement, but that serious confusion exists over the method to be employed in any given case. Whilst in all instances the classification of the offence continues to reflect the political need for action, the examination of alternative methods of enforcement reveals that there appears to be no consistent correlation betweem the characterisation of conduct, the enforcement method employed and the eventual outcome. Nevertheless, the influence of political and pragmatic goals is detectable in each of these aspects. The following section will review the choice of enforcement method in both jurisdictions.

a)EC

As well as formal prosecution, the Commission undertakes alternatve, more informal methods of enforcement [24]. DGIV's treatment of plea-bargained, negatively cleared and indivdually exempted cases bears witness to a more conciliatory attitude to the resolution of competition issues [25]. Whilst some of its individual enforcement choices are difficult to rationalise, the pursuit of political and pragmatic objectives remains paramount. The tactics for their attainment are equally recognisable. All plea-bargained cases are broadly constructed and are subject to a limited formalistic

analysis. Moreover, the evaluation of possible factors influencing the likelihood of an informal resolution reveals that DGIV continues to base its decision-making on ambiguously constructed and inconsistently applied criteria. To add to the confusion, the reasons underlying settlements are often identical to those justifying formal prosecution. Individually exempted crisis cartels and negatively cleared and exempted distribution agreements also receive a familiar formalistic analysis. Here too, DGIV's enforcement approach hinges on preserving a cloak of doubt around decision-making. For instance in individual exemptions, not only is there considerable uncertainty regarding DGIV's interpretation and application of Art.85(3) conditions to agreements, but there is also signifcant confusion created both by the flexibility of the *Metro* criteria, in relation to distribution arrangements, and by the scope and validity of qualifying criteria for rationalisation agreements. The scant and often unconvincing reasoning in Commission decisions only serves to exacerbate matters. A similar approach is revealed in DGIV's treatment of negatively cleared arrangements.

The attenuated nature and scope of defence rights is also displayed in these cases [26]. The secret nature of negotiations surrounding plea-bargaining and the limited legal value of such settlements places defendants in a weak bargaining position, leaving procedural safegards entirely at DGIV's discretion. Defendants involved in negative clearances and individual exemptions fare little better. Whilst both resolutions are formal Commission decisions, allowing firms the right to comment and full appeal rights, the pressures placed on defendants during negotiations may significantly undermine the effectiveness of these safeguards. The study has shown that DGIV's broad case construction, its formalistic evaluation, limitations on disclosure and the threat of prosecution and/or substantial fines are more than capable of constraining the firms involved in all types of resolution to settle on the Commission's terms. Thus, DGIV's conduct of informal settlements and exemptions displays the same basic pattern seen in formal prosecution. By introducing uncertainty and controlling defence rights, DGIV augments its own authority, whilst constraining the defendant's position. By ensuring the paramouncy of Reg.17, this policy appreciably enhances successful prosecution and therefore the attainment of political and pragmatic goals.

Whilst the study reveals that classification continues to dictate the construction and assessment of violations and defence rights, it seems from the examination of resolved and exempted cases that there is no consistent correlation between characterisation, the enforcement method employed and the eventual outcome. All resolved and exempted cases studied initially contained restrictive criteria of a type which have been formally prosecuted elsewhere as criminal violations. Yet, in the instant cases the Commission chose to apply very different enforcement methods to them. As a result, there are many examples of similar cases receiving dissimilar treatment. Those selected for formal prosecution are classified as inherently anti-competitive and treated as criminal matters. These case receive uncompromising prosecution and stiff fines. Elsewhere, in the face of similar restrictions, DGIV has employed a more reasonable, conciliatory policy, seeking the negotiation and modification of problematic clauses. Consequently, such cases are plea-bargained, individually exempted or even negatively cleared. Yet, the basis for the Commission's choices is not immediately clear. The evaluation of influencing factors has shed little light on the true rationale underlying DGIV's enforcement choices. What it has illustrated is the breadth and unpredictable nature of DGIV's discretion and the far-reaching impact this has upon defendants. Thus, of the formally prosecuted cases selected for plea-bargaining, the study was unable to locate a consistent basis for this choice. Yet, the difference in the level of sanction levied was often considerable. Further anomalies occur in DGIV's choice of which agreements to formally prosecute and which to individually exempt. For instance, its approach to evaluation has created considerable problems regarding the difference in constitution between price-fixing/market division cartels and restructuring cartels. Yet, the former are vehemently opposed and heavily sanctioned, whilst the latter, despite employing similar market strategies, receive exemption under Art.85(3). That it is not uncommon for a case to be labelled initially as a crisis cartel by DGIV only to conclude by being punished as a market division cartel and vice versa, considerably exacerbates matters [27]. Similar problems and discrepancies exist between the Commission's enforcement of formally prosecuted export bans and comparable restrictions which are negotiated and

exempted or even negatively cleared. Yet again. the basis of such choices has never been clearly articulated, but the impact upon defendants is immense. Even amongst individual exemptions DGIV's approach is confused and confusing. In *AMP*, the special characteristics of the market justified the exemption of a price-fixing clause. This finding not only conflicts with DGIV's normally overt antipathy to price-fixing, but it also contradicts its treatment of such conduct in rationalisation agreements, which can also plead special market conditions, yet where DGIV has staunchly refused to exempt such restrictions.

The serious anomalies ensuing from DGIV's choices means that its enforcement of competition matters is characterised by its arbitrary approach and disparate outcomes. Thus, in response to the research's question regarding which agreements are pro- and anti-competitive, the Commission's seemingly erratic use of its discretion means that the answer must be that whether and how a given arrangement will be enforced against and its eventual outcome are entirely unforeseeable.

This confusion impacts upon the apparent classification of resolved and exempted cases, leaving their precise characterisation in disarray. As formally prosecuted cases, plea-bargains have a clear criminal classification. But, DGIV's characterisation of exempted crisis cartels is less clear. Their horizontal nature, and thus their potential for disrupting economic unity, certainly inclines DGIV towards a quasi-criminal characterisation. But, lack of information in case reports means that the research has been unable to conclusively establish DGIV's classification of these agreements. Its approach to negatively cleared and individually exempted vertical cases is even more problematic. As already noted, such arrangements contain prima facie 'criminal' restrictions, but the subsequent lenient, negotiated nature of enforcement endows these cases with an apparently administrative characterisation. It should be emphasised here that the situation is not one in which DGIV regards these arrangements from the outset as unproblematic, administrative matters. It still insists that these agreements initially offend the *Metro* criteria and are thus potentially 'criminal'. But, instead of formal prosecution, the Commission enters into negotiations

and resolves matters administratively. So, it would seem that whilst classification controls the *need* for enforcement, it does not dictate the *method* employed. The study has suggested that DGIV's choice of enforcement method and its subsequent impact upon characterisation owe more to the Commission's erratic exercise of discretion than to objective evaluation or the absence of restrictive content in agreements. Indeed, the disparate nature of DGIV's enforcement choices indicates that other undisclosed considerations inform decision-making. This research has asserted that it is DGIV's pursuit of political and pragmatic goals which drives these enforcement decisions and produces inconsistencies. The situation appears to be to one in which political and pragmatic objectives impact upon both classification, and therefore the need for enforcement, and also the method of enforcement. But, the nature of these goals means that the way that they affect each aspect of enforcement is different and unpredictable. It is the capricious impact of these objectives which produces the confusion. Whilst this is impossible to establish conclusively without comprehensive access to DGIV's reasoning, the study has shown that the reasons proffered by the Commission do not always adequately explain its behaviour, but that its choices are entirely consistent with political and pragmatic goals. Each method of enforcement possesses its own political and pragmatic influences and advantages. In formal prosecution, political needs require and benefit from the high visibility deterrence of this approach. This is particularly so in the prosecution of horizontal cartels where the Commission is pitched against 'big business' in a battle for control of the market. In this context, the pragmatic need for speed and cost-effciency is met in DGIV's use of the resource-efficient 'object' analysis and the other 'law as a resource' tactics already discussed which maximise conviction prospects with the minimum consumption of resources. Plea-bargaining derives similar political and pragmatic influences and advantages to those in formal prosecution. The defendant's co-operation in his own conviction further serves these aims. In individual exemptions and other informal resolutions, the negotiation process is effective in serving political demands by securing bargains which promote Single Market integration and the overall health of the Union. This is particularly so in the case of vertical agreements.

In informal contexts, pragmatic aims are extremely influential. The Commission's straitened circumstances mean that every opportunity is taken to find the cheapest and quickest enforcement solution. As a result, the formalism of the 'object' analysis is employed. This allows the true market impact of restrictions to be ignored and thereby facilitates the bargaining and resolution of criminally classified conduct with significant pragmatic, and indeed political, benefits accruing. So, whilst the impact of political and pragmatic goals on decision-making results in the erratic selection of enforcement method with concomitant inconsistentcy and uncertainty, for DGIV, the political and pragmatic advantages to be gained from this approach make such risks worth running.

b) US

Both federal agencies possess a range of possibilities for informal settlement [28]. In both civil and criminal contexts, these permit the imposition of wide-ranging penal conditions on defendants. However, both agencies have been criticised for failing to utilise the full range of informal opportunities.

Defence rights in informal settlements have also caused some concern. The study has shown that, whilst some forms of settlement are binding, and so afford defendants considerable security, other types of resolution offer firms dubious protection. Moreover, the study has demonstrated that the absence of procedural protections governing the negotiation process permits prosecutors to use the threat of expensive litigation and the possibility of extreme penal sanctions to obtain a settlement. However, despite such potential drawbacks, US defendants are generally in a much stronger position than their EC counterparts and the popularity of negotiated resolutions continues undiminished.

Like the EC, the initial classification of the violation continues to govern the construction and analysis of informal resolutions. But also like the EC, the study has shown that the nexus between characterisation and whether and how informal settlements will be undertaken is ambiguous. Whilst classification does broadly dictate the range of resolution possibilities available in a given case, there is no clear

indication of which precise method will be employed, or indeed, whether an informal settlement will be pursued at all. The study has revealed that many of these choices rest on the prosecutor's discretion. Guidance controlling these decisions has been demonstrated as being limited and largely ineffective. In contrast, the research has shown that the impact of political and pragmatic goals on these choices is substantial. Political needs inform all aspects of informal resolution. The recent tougher political stance has affected the likelihood of informal settlements. Particlarly with the FTC, this has resulted in a preference for litigation over informal settlement. The resulting selective prosecution policy has been criticised for its unfairness. Similarly, political aims have impacted upon the choice of resolution method. For instance, the DOJ's more zealous criminal enforcement policy shows a preference for plea-bargaining over nolo pleas because of the former's ability to exact more punitive consequences. However, the research has shown that these political choices can clash with pragmatic objectives bringing Court and prosecutors into conflict. Moreover, there are clear indications that both the likelihood and scope of negotiated settlements may be the result of covert manipulation by both prosecutors and defendants. The Court's desire for expediency permits such influences to flourish unhindered. Legislation intended to control such political influences has often been ignored in the interests of pragmatism.

Thus, like the EC, the choice of enforcement method remains rather unpredictable and for much the same reasons. The very nature of political and pragmatic goals inevitably requires different solutions over time and circumstances. Changes in the political perspective of enforcement agencies inevitably alters policy. Both produce an inconsistent application of the rules. Uncertainty regarding how conflicts between political and pragmatic ends may be resolved merely exacerbates matters. Nevertheless, there are undoubted enforcement advantages to this approach for all concerned. It is a policy which ensures the cost-effective regulation of the majority of US antitrust issues. What is equally apparent is the US willingness to exercise enforcement powers for political and pragmatic benefit and a concomitant preparedness to create ambiguity and inconsistency, where necessary, in order to achieve those goals.

4)Conclusion - Part B

This review has illustrated that political and pragmatic objectives have an overwhelming impact on all aspects of the classification and application of competition rules. Political factors are particularly influential in controlling the initial definition and characterisation of anti-competitive conduct. Both goals exert wide-ranging influence over whether and how antitrust rules are applied, encouraging the incremental use of the 'law as a resource' to secure politically and pragmatically acceptable outcomes. By creating uncertainty over the interpretation and application of antitrust provisions and corresponding defence rights, competition authorities fashion for themselves a massive advantage, appreciably augmenting prosecution chances whilst diminishing the defendant's ability to, and opportunity for, successful challenge. By maintaining a lack of transparency over the choice of enforcement method, prosecutors acquire sufficient latitude to select the most expedient prosecution method and pursue as political or pragmatic a settlement as required in the absence of any real scrutiny. The overwhelming preference for informal methods in competition enforcement bears witness to the enormous influence pragmatic needs have upon antitrust decision-making. Step by step, antitrust's policy of uncertainty and inconsistency ensures the cost-effective eradication of all conduct threatening political and pragmatic objectives. Above all, the examination of enforcement methods highlights the strength and scope of prosecutors' authority, particularly DGIV's monolithic discretion, and their willingness to exercise their powers exclusively for political and pragmatic effect.

Indeed, such has been the extensive impact of political and pragmatic factors on antitrust enforcement within the study that it seemed to indicate that the use of the 'law as a resource' for political and pragmatic ends was likely to exist throughout competition enforcement. To this end, an additional analysis of the impact of political and pragmatic goals on the classification and application of UK antitrust enforcement was undertaken. Limitations on space do not allow it to be included in the main body of the research. However, it is reproduced in Appendix D.

C)THE IMPACT OF 'POLITICS AND PRAGMATISM' UPON THE 'RULE OF LAW'

This aspect of the study sought to evaluate whether the Commission's exercise of discretion promoted or impeded the 'rule of law' and thereby discover whether DGIV operated a consistent, equitable competition policy [29]. The analysis demonstrated the extensive impact of political and pragmatic goals on enforcement. At every point, DGIV's pursuit of these objectives constrained its exercise of discretion by requiring the 'rule of law' to be subordinated to these 'higher' goals. By allowing the effective enforcement of Reg.17 to prevail over the 'rule of law', this compromising of fundamental legal principles advances the Commission another step towards sucessful conviction. This outcome is secured by familiar tactics. Again, DGIV uses its dominance of the process, combined with the existing flexibility of the 'rule of law' principles, to create ambiguity over their scope and thereby control their construction and application. This allows DGIV to define the 'rule of law' to meet political and pragmatic needs. This use of the 'law as a resource' means that the 'rule of law' is co-opted and employed to legitimise DGIV's enforcement decisions. Consequently, the Commission's enforcement choices do not promote the 'rule of law', rather the 'rule of law' is used to support DGIV's choices.

The Commission's manipulation and subordination of these fundamental principles is aided by the Court who have shown themselves disinclined and incapable of exercising exacting control over DGIV's monolithic discretion. The research has illustrated that, not only do the Court insist upon deferring to DGIV's discretion to dictate the ambit and application of 'rule of law' principles, but that an even more fundamental flaw hinders the effectiveness of the Court's review. The study has shown that a mismatch exists between the nature and scope of DGIV's penal enforcement powers and the Court's administrative review powers. This disparity and its enforcement value to the Commission are familiar territory. Just as the evaluation of

the enforcement process demonstrated that one of DGIV's principal tactics for attaining political and pragmatic objectives was to create and exploit an imbalance in power between itself and defendants, here too, the analysis reveals that DGIV relies on a similar technique. Its monolithic discretion is employed to dominate the review process and dictate both the scope and outcome of review. As a result of such control, the Court's scrutiny is necessarily limited. Here too, is evidence that DGIV exploits this disparity extensively, using it to manipulate the 'rule of law' and justify its political and pragmatic choices.

The 'rule of law' evaluation bears clear evidence of a link between the manipulation of these tenets and political and pragmatic needs. On numerous occasions in the case study, DGIV's exercise of discretion was measured against Treaty aims, specifically the political goal of economic unity. On each occasion, this objective proved to be an overwhelming justification for the Commission's chosen construction and application of fundamental principles and a vindication of its enforcement choices. Moreover, the study has already demonstrated that DGIV has a vested political and pragmatic interest in creating and perpetuating legal uncertainty as a means of maximising its own powers whilst placing all other personnel involved in the process at a disadvantage. Pragmatism has also had a impact. DGIV's bureaucratic problems have encouraged it to take a pragmatic approach to the requirements of good administration and it has used this principle to validate its expedient decision-making. Finally, the research has revealed that the Court's review of 'rule of law' principles has also been influenced by political and pragmatic considerations.

This focus on political and pragmatic aims has had a major effect on fundamental principles. Quite simply, it has created a situation where the 'rule of law' does not control DGIV, rather the Commission controls it. As a result, there are many examples of disproportionate, discriminatory treatment, denials of legitimate expectations and an enforcement system which thrives on ambiguity, legal uncertainty and pragmatic solutions. Yet, DGIV's dominance of enforcement and review means that its use of the 'law as a resource' and manipulation of fundamental principles goes largely unchecked. Indeed, its control of the process serves to legitimise its choices,

illustrating the scope within the system for legitimate procedural improriety, whilst masking the reality of substantive injustice. Thus, in answer to the research's query as to whether the Commision pursues a consistent, equitable policy, the response must be that it does not. The hall-mark of the 'politics and pragmatism' approach is one of consistent inconsistency. It is a policy which has raised many concerns. Specifically, its subordination of both the Court and the 'rule of law' to political and pragmatic requirements not only leaves DGIV largely unaccountable, but may ultimately undermine the credibility of competition rules and Community law itself. Nevertheless, the approach possesses immediate political and pragmatic advantages. By shielding DGIV's enforcement choices from incisive review, it serves as the final step in a process which ensures that the Commission's political and pragmatic choices endure.

D)THE CLASSIFICATION OF ANTITRUST

Having reviewed each jurisdiction's application of competition rules and DGIV's treatment of 'rule of law' principles, it is now possible to comment on the overall classification of antitrust. The characterisation of competition rules may be gleaned by examining the nature and scope of enforcement powers and rights under the law and also in terms of the consequences the law may impose on violators. The following sections will briefly review each of these aspects in order to arrive at an overall conclusion regarding the characterisation of antitrust.

1)The Nature of Enforcement Powers and Rights

a)EC

The research has shown that DGIV's enforcement powers are extremely broad in nature. Specifically, the latitude of EC investigation and prosecution powers is comparable to that seen both in the enforcement of the criminal law and in the acknowledged criminal context of US antitrust. In addition, DGIV's references to offending conduct reveal a degree of opprobrium generally reserved for criminal behaviour. Moreover, the study has demonstrated that these powers are applied to achieve maximum punitive effect. In contrast, defendants' safeguards are of a limited, administrative nature. The study has shown that this curtailment is the direct result of DGIV's punitive approach towards enforcement. So, at every point, despite assertions to the contrary, there are clear indications that EC antitrust is overtly penal in nature. Indeed, the fact that the Commission can control not only the scope of enforcement powers and defence rights, but also the application of the 'rule of law', indicates the wide-ranging, penal nature of EC antitrust.

b)US

The scope of DOJ and FTC powers is even more extensive than those of DGIV. The DOJ of course possesses unequivocally criminal enforcement powers. However, the breadth afforded under the DOJ's and FTC's nominally civil powers means that there is little difference between the ambit of criminal and civil powers in the US. In particular, the intrusive, mandatory nature of fact-finding powers and prosecutors' ability and willingness to prosecute a wide range of conduct discloses the penality of US enforcement powers. Here too, the condemnation that violating behaviour attracts affirms US antitrust's patently criminal characterisation of such conduct. Whilst the litigation setting of US enforcement affords defendants substantive criminal and civil protections in their respective contexts, the overtly punitive interpretation and

application of antitrust rules reduces the actual scope of such safeguards, allowing all antitrust offences, whatever their nominal characterisation, to be prosecuted with maximum force. Such an approach leaves the criminal nature of US antitrust enforcement beyond doubt.

2)Consequences of Competition Rules

a)EC

When viewed in terms of the sanctions the law may impose, the penality of EC antitrust is beyond argument. DGIV's ability to impose decisions exerting comprehensive and long-term control over firms and its authority to levy enormous financial penalties for substantive infringements, as well as procedural fines for non-cooperation with prosecution, disclose the Commission's intention to punish antitrust offenders severely. In particular, it is the far-reaching impact of these sanctioning powers which confers upon EC antitrust an unequivocally penal character.

b)US

The consequences of US antitrust are manifestly penal. The DOJ possesses clear criminal sanctioning powers which are exercised in an increasingly punitive manner. In addition, the consequences of DOJ and FTC civil enforcement allow the agencies to exercise detailed, long-term influence over antitrust offenders. As with the EC, the power this gives these agencies is unarguably punitive. Finally, both the DOJ and FTC may impose stiff sanctions for non-cooperation. Again, the use of these powers highlights the jurisdiction's intention to exact maximum retribution for these violations. Thus, both civil and criminal sanctions in the US are incontestably penal in consequence.

3)Conclusion - Part D

This review reveals that for both jurisdictions antitrust is a criminal matter. In terms of both the nature and application and the consequences of competition rules, antitrust enforcement is unambiguously punitive. Elsewhere, in the UK, antitrust does have a different, administrative characterisation, but even here, proposed reforms would endow enforcement with a penal character. Thus, on the basis of this research it can be concluded that antitrust is essentially criminal in character. Having decided this, it is perhaps an apposite point at which to address Harding's concerns regarding the criminal nature of antitrust [30]. Firstly, Harding has questioned whether a repressive, criminal framework is an appropriate method of regulating competition, given that economic regulation is generally regarded as morally neutral. But, as Harding himself points out, many 'economic' offences are no longer regarded as morally neutral and now come within the criminal law. However, Harding concludes that the ever-shifting nature of morality in relation to 'economic' offences militates against labelling such conduct as criminal [31]. Two points must be made. Firstly, much conduct, particularly horizontal concertation, has been shown to have a far-reaching and detrimental impact on other traders and consumers and is widely condemned in most industrialised nations. Secondly, it is essential that the law possesses some flexibility. Providing such decisions are arrived at in a fair and orderly manner, there is no reason why behaviour not recognised as criminal may be brought within the criminal law where its detrimental effect makes a punitive response necessary. Indeed, to cast the law in stone invites the criticism that the law is an ass.

Similarly, Harding argues that blunt criminal sanctions are an inappropriate, inflexible, and therefore ineffective, means of controlling complex economic situations [32]. However, this study has shown that the sanctions and other means of controlling anti-competitive conduct available to enforcers are extremely wide-ranging and flexible. This is particularly so in the EC and US where antitrust is clearly criminal in nature. Cease and desist orders and injunctions, in the EC and US respectively, have been demonstrated as being extremely adaptable and are therefore sufficiently

sensitive to deal with most situations. Combined with the other avenues of resolution available to enforcers, there is no apparent reason why the criminal nature of the law should hinder the sensitive and effective economic regulation of markets. Indeed, there is no evidence to suggest that an administrative approach would be any more effective. Even a cursory examination of the problems besetting UK enforcement with its nominally administrative context reveals that much [33].

Finally, on the issue of the classification of antitrust, Harding asserts that an important question is whether the legal characterisation of antitrust violations should have any bearing on the degree of protection afforded to violators. He argues that maintaining the substantive fairness of proceedings by ensuring that defendants can defend themselves effectively should alone determine the scope of defence rights rather than a formal label of 'administrative' or 'criminal'. He goes on to assert that DGIV relies heavily on informal resolutions, and in such situations, defence rights are not as crucial. He considers that greater defence rights, aimed at ensuring a fair process, are only necessary in formally prosecuted cases where heavy sanctions are likely [34]. It is beyond argument that the repressive, punitive character of antitrust must be balanced by a comprehensive range of defence rights to ensure fairness - both substantive and procedural. But, surely these rights should apply to both formal and informal situations. Permitting a situation where prosecutors can, by labelling a case 'administrative', reduce the level of legal protection and which can be manipulated from case to case for prosecutors' benefit, is clearly unacceptable. Moreover, the coercive and unequal nature of the negotiation process in informal settlements means that substantive defence rights are no less crucial in this context.

From this discussion, it can be concluded that the criminal nature of antitrust does not per se produce overwhelming problems or adverse outcomes. But, the way the law is applied does give rise to concerns [35]. Whilst the criminal character of the law certainly highlights these difficulties, these problems cannot be attributed to the criminal nature of the law as difficulties are acknowledged to exist in the administrative context of UK antitrust.

E)CURRENT CONSEQUENCES

The current consequences of the EC and US approaches to enforcement and the principal problems underlying these results will now be reviewed. Above all, the research has highlighted the importance of political and pragmatic aims to the competition policies of both jurisdictions under evaluation. Each system's enforcement of competition rules bears witness to a single theme ; an insistence that the end - political and pragmatic goals, justifies the means - the use of the 'law as a resource'. The domination of these objectives has immense implications, both current and future for the well-being of both processes. For enforcers, many advantages accrue from this approach. For DGIV, it guarantees its exclusive control over the definition and subsequent treatment of anti-competitive conduct. At every stage of the process, this domination permits the unhindered use of the 'law as a resource' for political and pragmatic ends. Decision by decision, this incremental manipulation of the law ensures the inevitable conviction of all conduct imperilling political and pragmatic goals. At every point, these aims both dictate and justify the Commission's conduct.

For the US, the benefits are identical. The US process too appears geared exclusively to controlling conduct jeopardising political and pragmatic goals. In both jurisdictions, that control is inescapable. In both systems, political and pragmatic justifications are offered in vindication.

But, there is another side to this coin. Where the end justifies the means, nothing is sacrosant. Here, substantive soundness, individual justice, due process and the 'rule of law' are all open to attack. In pursuit of political and pragmatic ends, all are sacrificed to these 'higher' goals. Substantive soundness and individual justice are the first to be forfieted. In their place, political and pragmatic goals substitute the caprice of the Commission's monolithic discretion with its selective enforcement and erratic outcomes. These objectives also justify the means to these ends. Political and pragmatic aims validate formalism, case construction, the creation and preservation of widespread legal uncertainty, the dubious use of supporting evidence, questionable

economic evaluations and the repeated corner-cutting, all seen to be so typical of current antitrust enforcement. Where such tactics prevail, substantive soundness is impossible ; individual justice is imperilled.

Next to be renounced is due process. In its place are found disparity and inequality. Throughout the process, political and pragmatic aims legitimise the curtailment and denial of defence safeguards and thus the placing of defendants at a permanent and irremediable disadvantage. From beginning to end, due process is employed not to protect defendants, but to promote political and pragmatic goals. Due process simply becomes another weapon in the armoury of conviction. So, where political and pragmatic objectives dominate, due process is on their terms - or not at all.

Not only is antitrust's manipulation of the law for political and pragmatic ends achieved at the expense of substantive justice and procedural integrity. In the EC, the 'rule of law' also suffers. The realisation of political and pragmatic goals demands the subservience of even the most fundamental of legal principles. Such tenets are constructed to guarantee and validate the ascendency of political and pragmatic aims. As a result, discrimination, inequality, legal uncertainty, disproportionate treatment and bureaucratic sloppiness are made legitimate. Consequently, where 'politics and pragmatism' rule, the 'rule of law' does not.

Clearly, the enforcement advantages of this political and pragmatic approach are bought at a considerable price. That they are secured at the expense of substantive justice, due process, the 'rule of law', and indeed the integrity of the law itself, discloses the true consequences of this politically and pragmatically orientated policy.

1)Politics, Pragmatism and Justice

The fact that such system-wide problems can and do result necessarily brings into question the justice of the 'politics and pragmatism' approach. The following discussion will draw attention to the role played in this by the Commission's monolithic

discretion and the nature of political and pragmatic goals and will consider their individual impact on the overall justice of the 'politics and pragmatism' approach.

Many problems are the direct result of the breadth of the Commission's monolithic discretion and its willingness to use its powers exclusively for political and pragmatic ends. The research has revealed that this politically and pragmatically orientated policy has spawned an institution with monumental authority. An agency which is able to control, on demand, Art.85, Reg.17, due process, the 'rule of law' and the Court itself. The research has shown that it is DGIV's monolithic role which places it in a position of dominance from the outset and provides it with virtually unfettered freedom regarding the conduct of all aspects of enforcement. It is the Commission's monolithic discretion which enables DGIV to manipulate the law at will to do its bidding, to obtain incriminating evidence by the most direct means, to alter the balance of proof and make weak cases strong, to sanction guilt on the basis of supposition and prejudice, to impose settlements and to attenuate and deny defendants' protections. In short, to construct conviction and render antitrust criminal. Of particular importance is the fact that DGIV's unassailable dominance is used to augment its own powers even further, specifically at the expense of defence safeguards, and give the Commission an enforcement advantage that others in the process are unable to surmount. This penal use of the 'law as a resource' to create disparity validates the study's hypothesis that the Commission's monolithic role substantially offends against defendants' due process rights and leaves the punitive nature of antitrust insufficiently balanced by due process protections.

Unfortunately, the study has shown that no comfort can be derived from the fact that the Commission's monolithic advantage has been used to secure a just result and enhance the integrity of Community law. Rather, DGIV's supremacy has been employed exclusively for short-term political and pragmatic gain. The research has illustrated that this policy has resulted in ambiguity, disparity, arbitrary decisions and erratic outcomes. Overall. it has raised widespread concerns over the propriety and equity of the Commission's decision-making. DGIV's repeated disrespect for defence safeguards is of particular concern. Its monolithic role imposes a duty of

evenhandedness upon DGIV which has been regularly abused [36]. Yet, this disregard for fudamental protections is perhaps unsurprising. It has long been accepted in Community law that fundamental defence rights are subordinate to effective enforcement. DGIV merely uses its monolithic discretion to take this belief to its logical conclusion. Community precedent necessarily validates DGIV's conduct. Nevertheless, the equity of such an approach is debateable, particularly given the punitive character and application of competition rules. That defence rights can be set aside with impunity surely cannot be equitable. Yet, despite weighty criticism from influential parties like the House of Lords Select Committee and the CFI, DGIV has shown little remorse and has insisted upon continuing its policy of disparity unabashed [37]. Moreover, the study has illustrated that the Commission is prepared to use its monolithic discretion in any way to attain its political and pragmatic goals. Its doctoring of evidence in *SIV* discloses an explicit attempt to subvert justice in favour of political and pragmatic needs. One wonders how many more times this has occurred but has remained concealed under the breadth of DGIV's discretion. If DGIV is prepared to exercise its powers in this manner in open, formal proceedings, the propriety and equity of its decision-making in more covert conditions is necessarily arguable. Certainly. its behaviour has brought its integrity into doubt. Yet, it must be remembered that all of the Commission's actions are entirely legitimate. The breadth of its monolithic discretion ensures that. Such an outcome discloses the scope within the Commission's monolithic authority for legitimate impropriety and DGIV's willingness to exploit that latitude for political and pragmatic ends. DGIV's behaviour may be legitimate - but it does not deliver justice. Indeed, such tactics beg the question how can DGIV expect compliance with, and respect for, competition rules when it demonstrates so little respect for the law itself. Inevitably, the Commission's manipulation of the law for political and pragmatic ends undermines the integrity of competition law itself, especially when employed so frequently and with such disparate results. Over the years, DGIV's application of its monolithic powers has undermined the fabric and credibility of competition rules, producing extensive disparity and discrimination and engendering the resentment and non-compliance of undertakings

throughout the Community. Such achievements surely provide indisputable proof that absolute power corrupts absolutely. It undoubtedly furnishes evidence of monolithic authority pursued to the dereliction of justice, to the point where DGIV's present conduct indicates that it would be foolish to permit the Commission to continue wielding so much power [38]. Certainly, without the advantage of its monolithic authority, DGIV could not wreak so much havoc upon the integrity and credibility of Community competition rules. Admittedly, defendants too can indulge in an equally detrimental manipulation of the law for their own purposes. Space limitations have meant that it has been impossible to investigate this aspect of antitrust enforcement. Nevertheless, it too poses a significant threat to the equity and integrity of antitrust. But, it must also be acknowledged that such behaviour on the part of undertakings can never be justification for the Commission's own caprice and disregard for due process and the 'rule of law'. Nor can it excuse DGIV's own lack of principle. If the Commission wants adherence to the law, surely it should be prepared to lead the way.

The research has argued and demonstrated that a further problem with the Commission's monolithic powers and its sole focus on political and pragmatic goals is that this combination distorts DGIV's exercise of discretion. The supremacy of the integration goal, as enunciated by Arts.2 and 3(g), conflicts with Art.85, compromising DGIV's independence by leaving it insufficiently distanced from the political forum whilst rendering it largely unaccountable. The 'rule of law' evaluation illustrated how the Commission's dominance of enforcement has enabled the subjugation of 'rule of law', and in so doing, has commanded the allegiance of the Court. Often, this has resulted in the virtual absence of effective challenge or review of DGIV's activities. Whilst the research has shown that the structure and scope of review powers limits the ambit of the Court's supervision, it must also be acknowledged that where they have so chosen in the past, the Court have found means of using their powers to pursue a more activist policy. Thus, the Court must shoulder some of the blame for allowing the Commission's monolithic enforcement to operate unhindered with such detrimental results. Not only has the Court's inconsistent and confused approach to precedent limited the scope of effective supervision, but their

attitude on review is disquieting. Their approach has been one of repeated affirmation of the Commission's monolithic discretion and the need for effective enforcement - whatever the price. Too often, the Court have recognised the principle under review but have held that DGIV's procedural irregularities do not vitiate the decision. By refusing to acknowledge procedural integrity as a value in itself, the Court have legitimised DGIV's manipulation of the law. The reasons for the Court's attitude are very familiar. The study has shown that for the Court too, political and pragmatic considerations determine and justify their attitude towards competition enforcement. As a result of the Court's protectionist policy, disparity, procedural impropriety and the widespread subversion of the law have been upheld - all in the interest of 'politics and pragmatism'. Quite simply, this reveals that for the Court too, political and pragmatic goals are more important than justice [39]. Yet, by permitting such behaviour to go unpunished, the Court undermine rather than uphold the integrity of the law, exacerbating the damage already inflicted by DGIV. The simple fact is that the Commission will not show proper deference to due process and the 'rule of law' until the Court demand it of DGIV. But, whilst the Court are controlled by political and pragmatic considerations, the outlook for legal integrity is grim. The only hope is the CFI. At present, it seems that the justice of EC competition enforcement rests solely on this institution's continued preparedness to minutely audit DGIV's evaluations and decisions. Without them, the Commission's monolithic position and construction of antitrust appears unassailable.

A similar situation prevails in the US. Whilst US antitrust does not enjoy the same monolithic discretion as the EC, this system has taken every opportunity to enhance its discretion and its ability to manipulate the law and control enforcement, with a similar detrimental impact upon the justice and integrity of antitrust enforcement. However, whilst many of the criticisms made above apply equally here, the litigation setting of US enforcement means that the problems encountered here are much less severe than those in the EC.

Overall, this review suggests that, in the context of antitrust enforcement, discretion and justice are uneasy partners. Moreover, it appears that the greater the discretion, the more justice is jeopardised.

As well as difficulties relating to the Commission's monolithic role, the research has also highlighted fundamental problems caused by the inadequacies of an appproach based on political and pragmatic goals, in particular, the fickle outcomes engendered by these aims. It has been seen that the very nature of the 'politics and pragmatism' approach encourages legal uncertainty, discriminatory treatment and erratic outcomes, leading to widespread substantive injustice in the enforcement of antitrust. Several aspects of this approach contribute to this overall outcome.

Many problems result from the unpredictable demands of political and pragmatic objectives. For instance, the study has shown that DGIV's wide discretion provides it with the freedom to choose the constitution and characterisation of violations under Art.85, thereby securing control over potentially troublesome conduct and ensuring the attainment of political and pragmatic goals. But, the basis of the Commission's decision-making is not a rational evaluation that such practices are economically harmful. but that they offend political and pragmatic aims, specifically the integration goal. The trouble with this approach is that it is open to covert political influences and is riddled with uncertainty as, over time and circumstances, what suits political and pragmatic needs alters. So, in changing political circumstances, the same agreement may be viewed as a serious criminal offence, a simple administrative matter or even as of no relevance to antitrust enforcement. That the very nature of these goals requires such different solutions at different times necessarily leads to confusion and inequality. In this respect, the overpowering needs of the EC's integration goal serve to magnify such consequences.

The fickle demands of political and pragmatic ends can be detected in other aspects of enforcement. Most notably, it has had a dramatic effect on DGIV's choice of enforcement method. It has been demonstrated that many similar restrictions, particularly those in vertical arrangements, are treated very differently. Some are formally prosecuted, some are bargained, others are individually exempted or even

negatively cleared. No objective rationale has been detected explaining these different outcomes. However, whilst impossible to conclusively prove, it has been asserted that all such decisions provide substantial political and pragmatic benefits. This approach has resulted in the unsatisfactory situation where no predictable correlation exists between the classification and treatment of offences. Political and pragmatic objectives have been shown to impact upon both of these aspects of enforcement, but not necessarily in the same way. Thus, at the dictate of these goals, a restriction may be classed as criminal, but for political and pragmatic reasons, it may not be enforced against as such. Such an outcome seriously exacerbates existing confusion and uncertainty. These findings validate the initial hypothesis of the research that the 'politics and pragmatism' approach to antitrust enforcement is not dynamic but contradictory. The volatility of these goals means that they are applied routinely to similar agreements in different ways with often very controversial results. Clearly, the pursuit of such a policy must be a direct cause of the present legal uncertainty in EC antitrust. Again, the potency of the EC's integration goal exacerbates such outcomes. Over time, such an unpredictable approach can only undermine the juridical basis of competition law. Admittedly, some evolution over time is necessary to maintain the flexibility of the law and meet the demands of justice. But, when changes occur because of political caprice or administrative convenience, this not only renders the law extremely unpredictable, but inevitably brings its equity, credibilty and integrity into question.

A further problem is the nexus between political and pragmatic goals and the use of the 'law as a resource'. This study has shown that having such ends as the principal focus of antitrust has a far-reaching impact upon the application of competition rules. It is these political and pragmatic demands which drive the manipulation and subversion of both Art.85 and Reg.17, as well as due process and the 'rule of law'. Most potently, the overpowering and imperative nature of the integration goal means that where political needs and justice conflict, justice is subordinated. Under this approach, law and economics are nothing more than tools used to mask covert political decisions and so endow them with legitimacy. Yet, this

research has also demonstrated that this use of the 'law as a resource' for political and pragmatic ends neither achieves economic integration, solves administrative problems nor encourages compliance. It merely results in widespread inequality, uncertainty and confusion. Given such results, the 'politics and pragmatism' approach evidently has serious implications for the justice and credibility of antitrust enforcement. That such ends are achieved at the price of substantive soundness and consistency is discrimination triumphing over fairness. That the law can be manipulated so readily and so frequently for political and pragmatic advantage, but to the detriment of others, places profit before equity. That political and pragmatic aims require the subversion of due process and the 'rule of law' advances expediency at the expense of integrity. Over time, such outcomes erode the credibility and integrity of antitrust. In so doing, they validate the research's assertion that 'politics and pragmatism' distort the application of competition rules with the outcome that the very aim of achieving Single Market integration will result in the disintegration of economic unity by undermining the juridical basis of EC antitrust and Community law in general. Finally, the Commission's insistence upon political and pragmatic goals as the central focus of enforcement and the manipulation of the law to those ends, discloses that, in truth, the EC does not rely on competitve forces to control markets ; rather the Commission controls them for the benefit of political and pragmatic goals. This is regulation, not competition, nor necessarily justice.

The pragmatism goal has brought its own problems by encouraging the widespread use of informal settlements. The research has shown that this has done little to relieve bureaucratic difficulties. Certainly, DGIV's administrative problems are as great as ever. Instead, it merely adds to the problem by increasing legal uncertainty and encouraging both a disregard for defence rights and discriminatory enforcement. Again, such outcomes impact upon the long-term welfare of competition law. Warnings over the priorities that this approach embodies have gone unheeded. For almost 15 years, the House of Lords Select Committee have insisted that the goal of administrative convenience can never justify the denial of natural justice [40]. Despite such admonitions, DGIV continues to promote, as the central plank of its competition

policy, an enforcement approach which jeopardises natural justice. Evidently, for DGIV pragmatism is a priority ; natural justice is not.

Clearly, this exclusive focus on political and pragmatic needs has an immense impact on the equity of this approach. These goals control all aspects of enforcement ; characterisation, enforcement method, outcome and the strategies employed to achieve these ends. Yet, by their very nature, the effect of these aims on individual cases is necessarily unpredictable and inconsistent. Time and again, the study has shown that the chief legacy of this approach is widespread unfairness. This has weighty implications for the justice and credibility of EC antitrust. It is highly debateable whether such goals are an appropriate focus for the equitable control of competition issues. Such outcomes beg the question why should due process, the 'rule of law', and indeed the integrity of an entire legal system, be placed in jeopardy for such short-term gains.

With regard to the other jurisdiction under consideration, the research has illustrated that the US broadly pursues the same ends by the same means. Here too, political and pragmatic goals are the exclusive focus of antitrust enforcement. To achieve these objectives, the US relies on the incremental use of the 'law as a resource'. Thus, the criticisms made above regarding the problems and inadequacies of this approach apply equally here. In consequence, similar implications for the integrity and credibility of US antitrust pertain.

2)Conclusion - Current Consequences

This examination of the current consequences of antitrust enforcement has shown that problems exist in both jurisdictions, though they are notably more severe in the EC. The review has highlighted the role played in these problems by the extensive discretion of enforcing agencies, particularly the Commission's monolithic authority, and the exclusive focus on political and pragmatic goals. It has shown that alone each of these factors is responsible for many negative consequences, but that together, they are a lethal combination, producing widespread uncertainty and inequity at every turn.

In the EC, the monolithic nature of DGIV's authority, and more potently, the strength and urgency of the integration goal, serve only to augment such undesirable consequences. Of course, any exercise of discretion permits some selection from a range of choices, and some political influence in antitrust is inevitable, but the research evidence indicates that, particularly for DGIV, this exercise of discretion is capricious with both law and economics being used as resources to achieve essentially political decisions and endow them with credibility and legitimacy. Particularly in the EC, the result is a system based on questionable objectives, operated by an unaccountable but politically biased agency, where the ends justify the means and the outcomes are unforeseeable and erratic. A similar, though more attenuated, situation pertains in the US.

Such uncontrolled discretion resulting in such unpredictable outcomes, inevitably undermines the justice, integrity and credibility of antitrust [41]. Certainly, the capricious exercise of discretion neither promotes the justice, integrity nor credibility of competition law. The research findings raise fundamental concerns over the integrity of an enforcement approach where the end so regularly justifies the means. Such a rationale also places the credibility of antitrust in doubt. The use of law and economics as resources to legitimise the erratic outcomes of the 'politics and pragmatism' approach axiomatically discredits both law and economics, so diminishing the integrity and credibility of antitrust. Moreover, given the unreliable demands of these goals, it is arguable whether such objectives can ever deliver justice. In practical terms, these findings mean that a decision must be taken regarding whether the benefits of this approach outweigh and justify the disbenefits. This review of the current consequences of antitrust enforcement would seem to indicate overwhelmingly that the answer is no.

F)FUTURE IMPLICATIONS

Further support for the conclusion that the 'politics and pragmatism' rationale is unjust, and therefore an inappropriate focus for antitrust enforcement, is found in research elsewhere. Such studies indicate that the future implications for antitrust of such ends justifying such means are formidable. The following sections will review briefly the findings of the criminolgical analogy and research evidence from studies into other areas of regulation and assess their implications on the future of antitrust.

1)Criminolgical Analogy

This analogy revealed numerous similarities between the English criminal justice system and DGIV's antitrust enforcement. These resemblances will be summarised broadly below.

For each jurisdiction, crime control dominates from the outset. Both systems share the same crime control objectives. For each, the sole focus is on the repression, by any means, of criminal conduct and the need for cost-efficient enforcement. Here, the analogy revealed that DGIV's exclusive emphasis on the eradication of politically threatening conduct and its insistence upon cost-effective enforcement, in other words its political and pragmatic aims, are crime control goals.

In pursuit of these ends, both systems use familiar crime control techniques. Both rely heavily on the incremental use of the 'law as a resource' to achieve their objectives. Both pursue the creation and preservation of uncertainty. Both rely on formalism and case construction to make weak cases strong and ensure conviction. Each uses its powers to dominate enforcement, to curtail defence rights and to maintain the prosecution momentum and prevent effective challenge to its construction of conviction. Each extensively exploits due process, co-opting defendants to assist in their own conviction. Each makes punitive use of its powers to ensure the

attainment of its objectives. In both processes, every action bears witness to the crime control belief that the end justifies the means.

Extensive research on the criminal justice system has revealed the inadequacies of the crime control approach. Above all, it indicates that these goals, pursued by these means, have critically impaired the justice, integrity and credibility of the criminal process. This has resulted in numerous miscarriages of justice, increasing non-compliance, the disrepute of the system and a growing sense of crisis and chaos within the criminal process [42]. Thus, the criminolgical analogy indicates that the future implications of the Commission's present approach are forbidding. It suggests that, if continued, DGIV's use of the 'law as a resource' for political and pragmatic ends is destined to reap a grim inheritance.

2)Administrative Analogy

Research into other areas of regulation shows that the Commission is not alone in its emphasis on political and pragmatic goals [43]. These studies have shown that other regulatory agencies pursue a highly discretionary approach towards enforcement. Moreover, like the Commission, their discretion is informed by a range of political, pragmatic and other extra-legal considerations.

Research has revealed that these areas of regulation are politically sensitive and thus political goals play an important part in decision-making. Not only is the overall enforcement policy affected by the general political climate, but individual decisions are also influenced by the political position of the agency and the amount of political support it can muster [44].

Many pragmatic/extra-legal considerations have been found to impinge upon decision-making. The need for speedy, cost-efficient enforcement, and linked to this, the cost, benefit, time and trouble required to prepare a case, the fear of losing a prosecution with a detrimental effect upon an individual enforcer's credibility and promotion prospects, a desire for the agency's discretion alone to control enforcement, and a concomitant reluctance to employ enforcement methods which hand over

control to others, principally the courts, and situational factors like the individual relationship between the enforcer and the business concerned all impact upon a range of enforcement decisions [45]. These political and pragmatic factors inform all aspect of decision-making. As with DGIV, political goals have a major impact on whether the conduct constitutes an offence, and if so, the gravity of the violation. This decision is also influenced by the individual enforcer's discretion and his relationship with, and opinion of, the firm concerned. Where the firm is co-operative, problematic conduct is viewed as accidental, where a firm has a bad reputation, the behaviour is perceived as a deliberate and serious violation [46].

In turn, these decisions affect whether and how cases are prosecuted, and thus, case construction. As with DGIV, political goals tend to dictate the zealousness of the agency's prosecution policy. In addition, the pragmatic factors noted above are all extremely important at this stage. In particular, the desire to dominate enforcement, the need for cost-efficiency and situational factors have a significant impact upon case construction and the management of enforcement. Together these political and pragmatic factors militate against formal prosecution and encourage an enforcement approach which places great emphasis on discretion, negotiation and compromise and which does everything in its power to avoid confrontation and coercion [47].

Like the Commission, regulatory agengies use the 'law as a resource'. In particular in case construction, the law is interpreted and constructed to suit the agency's chosen enforcement approach. The overwhelming political and pragmatic emphasis on informal resolutions and the preference for obtaining co-operation and compliance means that cases are routinely constructed as best being resolved by informal means and therefore not requiring formal prosecution [48]. Like DGIV, agencies also use the 'law as a resource' in negotiations. Here, it is employed as a bargaining tool. Threats of formal prosecution and heavy sanctions are widely used to obtain the pragmatic solution required [49].

The overall impact of political and pragmatic objectives on the enforcement policies of regulatory agengies is to produce a highly pragmatic, flexible, discretionary approach which often rests on the perceptions and opinions of an individual enforcer.

This has resulted in many individualised and fragmented outcomes [50]. These findings are supported by more general research into regulatory enforcement. In particular, McBarnet and Whelan emphasise the inherent malleability of the law and its use by regulators and regulatees as a resource in many enforcement situations [51]. They also discuss the movement in regulation towards a broad, discretionary approach to enforcement and note that this approach has been criticised on a range of political and pragmatic grounds [52]. Most importantly from the present research viewpoint, this pragmatic approach has been condemned on grounds of legitimacy because it creates widespread legal uncertainty, leading to discrimination and inequity. Such a broad, discretionary policy is viewed as impracticable and over-inclusive and likely to produce outrageous results. For these reasons this discretionary approach has resulted in political controversy and resistance at a number of levels within enforcement [53]. Overall, these problems have served to impair the credibility and integrity of this discretionary approach to enforcement. The difficulties it has caused have brought calls for a return to more formalised decision-making [54].

From this brief review of regulatory enforcement, it is apparent that the Commission is not alone in its approach. In other regulatory areas, there is evidence of a highly discretionary use of the 'law as a resource' driven by political and pragmatic considerations. But, there is also concern here for the impact of that extensive discretion and the influence of political and pragmatic aims on enforcement choices and outcomes. At the basis of this disquiet is evidence that, here too, the use of the 'law as a resource' for political and pragmatic ends produces uncertainty, discrimination and inequity, ultimately undermining the integrity and credibility of the law. These studies of regulatory enforcement also support the contention that, if the Commission continues its present policy of using the 'law as a resource' for political and pragmatic objectives, the impact upon EC antitrust enforcement will be catastrophic.

3)Conclusion - Future Implications

This review of criminological research on the criminal justice system and administrative studies into areas of regulation reveals many similarities with antitrust enforcement. All pursue a discretionary policy using the 'law as a resource' for political and pragmatic gain. Though this element of the research has focused on comparison with the Commission, the fact that the US employs similar enforcement strategies for political and pragmatic benefit, means that the implications of the above research findings apply equally to US antitrust [55]. As such, the review has disquieting future implications regarding the impact of the 'politics and pragmatism' rationale on the welfare of antitrust as a whole. Both the criminological and administrative research evidence unequivocally support the contention that this approach is unjust. Combined with the evidence obtained from the assessment of the current consequences of antitrust enforcement, the findings overwhelmingly point to the conclusion that the use of the 'law as a resource' for political and pragmatic advantage, however nominally classified, however analysed, is erratic and unfair and will ultimately end in disaster by irremediably impairing the integrity and credibility of antitrust.

G)JUSTICIABILITY AND THE FUTURE

1)Justiciability

The quantity and severity of problems revealed by this study lead one to question the very justiciability of the issues under consideration. This is particularly so given that the difficulties extend to the most fundamental level of 'rule of law' principles. The following sections will briefly address what is meant by justiciability and will then

consider possible aspects of antitrust enforcement which may threaten the justiciability of competition rules.

The basis of justiciability is that certain issues are analytically unsuited for resolution by adjudicative process, ie by decision in accordance with pre-formulated rules, standards and principles. This may occur because some special expertise is required or because of the nature of the matter to be decided or the practicalities of enforcement. In such situations, the integrity of the decision-making process is eroded or destroyed because it is impossible here to jusify the decision by reference to rational standards [56]. Examples of tasks compromising justiciability include polycentric issues. These are problems which involve a complex network of relationships with interacting points of influence. As such issues are affected by, and in turn affect, in often unpredictable ways, a range of matters beyond the immediate issues under they are regarded as non-justiciable [57]. The complex and far-reaching nature of competition issues would seem to bring such matters, at least to some extent, within the scope of polycentricity and therefore raise questions over their justiciability [58]. Most importantly from the present research viewpoint, issues may be non-justiciable because of their high economic and/or political content. It is argued that, as such issues involve the evaluation of many complex public interest factors, they are unsuitable for judicial resloution. As antitrust decision-making has a particularly high political and economic content, its justiciability has been questioned on this basis [59]. A further category of non-justiciable tasks, also of relevance to the present discussion, are issues requiring a high degree of discretion to be exercised. The greater the discretion exercised, the less justiciable matters become [60]. Clearly the high degree of discretion evident in antitrust enforcement would seem to threaten the justiciability of competition issues. As a final point, it is important to emphasise that justiciability is not a clear-cut issue, but is always a matter of degree.

The ensuing discussion will examine further the justiciability of antitrust in the context of the present research and attempt to assess the degree to which the problems and issues raised by the study threaten the justiciability of antitrust. The two most problematic areas of present antitrust enforcement likely to compromise its

justiciability are the extensive discretionary powers at work and the focus on political and pragmatic goals. Firstly, it has been noted already that the high degree of discretion in antitrust decision-making threatens its justiciability by rendering issues unreviewable. The most obvious starting point is to consider whether it is the legislative format of present competition rules which limits the efficacy and justiciability of antitrust either by granting an inappropriate degree of discretion or by providing the 'wrong mix' of rule type and enforcement strategy [61]. Whilst the jurisdictions examined both employ broad competition legislation, the formalistic approach of UK antitrust has also been criticised extensively [62]. This suggests that it is not any one rule type producing the problems. Moreover, it seems that, whatever the initial legislative format, most systems resort to a highly discretionary approach [63]. Furthermore, as most systems possess a wide range of enforcement strategies, nor do they seem compromised in this respect.

This opting for discretion is not necessarily at fault. Research into optimal forms of legal control suggests that complex, dynamic issues like antitrust are difficult to control successfully by strict, inflexible rules [64]. Thus, some discretion in antitrust decision-making is clearly necessary. However, the same debate also reveals that the extensive exercise of discretion impacts upon both the justiciability and justice of decision-making. Discretion which is too broad or which is ineffectively controlled results in arbitrary, unpredictable, inconsistent and unaccountable outcomes [65]. Such conclusions mirror the present study's findings on antitrust enforcement. Time and again, the exercise of antitrust discretion has been shown to produce uncertain, disparate and unreviewable outcomes. Thus, it can be concluded that discretionary decision-making in antitrust is not in itself harmful, but that the present amount of discretion, in the absence of telling control, seriously undermines both the justice and justiciability of antitrust and therefore its integrity. Research indicates that the greater the discretion exercised, the more these values are jeopardised [66]. The implications of this for the Commission's monolithic discretion are formidable.

Next the justiciability of a system based on political and pragmatic objectives must be assessed. The high economic and political content of decision-making under

such objectives has been suggested as compromising justiciability. In this context, research into arbitrary decision-making is relevant [67]. An arbitrary decision is generally regarded as one where there is no objective reasons for believing that the action is a rational means to a given end [68]. This definition of arbitrariness may be extended to include a link with discretion, in that the range of choices available under an exercise of discretion give rise to uncertainty and unpredictability as regards likely outcome. This itself constitutes an sense of arbitrariness [69]. Moreover, the research argues that to act without regard for consistency is to act arbitrarily [70].

This has considerable implications for the 'politics and pragmatism' approach. In the context of the present research, it suggests that political and pragmatic goals are improper criteria for legal control because they cause the unpredictable and inconsistent exercise of discretion. The present research has shown a direct link between political and pragmatic aims and the Commission's use of its monolithic authority to manipulate the law for such purposes. It has also been demonstrated that this use of the 'law as a resource' for political and pragmatic ends has produced the very arbitrary and inconsistent results forecast by the above research. Permitting such ends to determine the means and outcome of legal control camouflages the reality. The issues being decided are not legal ones. They are political and economic matters. The law here is merely the tool of legitimacy. Allowing political decisions to masquerade as legal ones, with such capricious results, neceassarily compromises both the justiciability and justice of the 'politics and pragmatism' policy. Worse than that. It significantly undermines the integrity of both the rationale and the law itself. In this respect, the potent demands of the EC's integration goal yet again aggravate such consequences. The implications of this for the EC, and antitrust in general, are perturbing.

2)Recommendations for Reform

These problems are not without their solutions. Research into legal control reveals that difficulties relating to excessive discretion can be overcome, at least in part, by striking

the right balance between rules and discretion [71]. In essence, greater structuring and accountability of discretion are required. Thus, strategies aimed at confining discretion within safe but effective bounds, structuring it by reference to clearly enunciated criteria, transparent decision-making and procedures and independent and incisive review are necessary to curtail the ill-effects of discretionary decision-making whilst retaining the benefits of this approach [72].

In the context of EC antitrust, a number of reforms would be of assistance in solving present problems. Above all, an immmediate and major reworking of Reg.17 is long overdue [73]. Broadly, reform of Reg.17 should openly acknowledge the penal nature of antitrust and should incorporate explicit statements regarding the scope of both the Commission's powers and the defendant's rights. Defendants should be accorded broad protections sufficient to balance the acknowledged penality of antitrust sanctioning. It should also establish greater and more effective controls upon the Commission's exercise of discretion at every stage of the process.

At investigation, such reforms would require clearer specification of the purpose and scope of investigations and the type of documents being sought. More explicit guidance on the exercise of inspectors' powers should be provided. Greater scrutiny of the need for an Art.14(3) decision is essential. Reform of Reg.17 should provide a system of judicial warrants to counteract present problems [74]. Such reforms would enhance legal certainty, facilitate review and curtail the possibility of 'fishing trips'. Principally, reform of defence rights at investigation, must affirm defendants' rights to silence, to legal professional privilege and legal representation during investigation. In particular, Reg.17 must address the grey divide between the right to silence and the duty to co-operate. The precise location of the line between the two must be stated. Furthermore, a decision must be make as to whether, in the event of a conflict, the defendant's right to silence or his duty to co-operate prevails [75]. With regard to legal professional privilege, the present exclusion of in-house lawyers is an unfair anomaly. Thus, the privilege should be extended to cover such personnel. Finally, the criminal nature of the law requires that DGIV inspectors should respect the

defendant's right to legal representation. Oral questioning should not commence until a legal representative is present [76].

Of paramount importance to the fairness of the entire process are reforms to the access procedure at prosecution stage. DGIV cannot be allowed to continue denying and curtailing defendants' access to evidence to suit its enforcement requirements. Defendants must be permited uninhibited access to exculpatory information. Thus, Reg.17 should incorporate a substantive right to full disclosure. An independent party, either the HO or the Court, should rule on disputes regarding confidentiality and disclosure [77].

At trial stage, the most important reform needed is for greater clarity in the Commission's sanctioning assessment. DGIV should be required under Reg.17 to explicitly state, in relation to each defendant, the role and weight of each aggravating and mitigating factor and how it arrived at the final penalty levied. Such a requirement can do nothing but enhance legal certainty and bring greater accountability to DGIV's decision-making by facilitating later review [78].

The problems encountered in relation to the burden and standard of proof must also be addressed. Reg.17 should incorporate statements outlining each. The penal nature of EC antitrust requires that a standard of reasonable doubt be set. A further area of proof requires reform. Given the frequency with which the establishment of an offence concerns the scope and evidential requirements of a concerted practice and the present confusion surrounding both issues, it is imperative that the Court issue clear guidelines on these matters. It is unacceptable for DGIV to continue, as it did in *PVC*, to state that it was uncertain as to the exact duration of the offence and the number and identity of participants and then proceed to levy severe penalties. If such sanctions are to be imposed, equity requires that it is done on the basis of sound proof. Thus, it is essential that the Court define explicitly the ambit of offending conduct and what constitutes adequate proof of it. The penal nature of the law requires that independent and exacting proof of the duration and impact of the violation and the identity and role of the perpetrators is adduced. This is particularly vital in the context of complex infringements where sanctions are most severe. Stricter evidential

requirements on such matters should assist in preventing the manipulation of the law and the dangers of the sum of evidence outweighing its whole.

Reforms in relation to the HO and Advisory Committee also seem essential. DGIV's ability tto sideline the HO is particularly concerning. Thus, the HO's position in the process must be strenghened so that he can protect defendants effectively. His rulings, both in relation to access and to decisions made during oral hearings, should be accorded the status of formal appealable decisions. Moreover, in deference to defence rights, the HO's Report should be published. Such reforms should enhance the HO's status and therefore his ability to protect due process [79]. The Advisory Committee's position in the process has also provoked disquiet. Thus, a statement clarifying its role and the weight and the political content of its decisions seems to be a minimum requirement. Moreover, if its decisions are to have any value, it must be ensured that the Committee is fully informed of the case before it. Finally, respect for the principle of audi alteram partem requires full disclosure of the Committee's Report [80].

Given the paramouncy of informal resolutions in antitrust enforcement, greater transparency and accountability should be introduced into such settlements. The legal status of all such resolutions should be upgraded to formal appealable decisions requiring publication. The introduction of a system of consent orders, similar to the US procedure should be considered [81]. Furthermore, Reg.17 should make clear that defendants submitting to informal settlement enjoy the same substantive protections as those subject to formal prosecution. Finally, to counteract the sluggishness and inefficiency of the bureaucratic process, time limits should placed on decision-making. Reg.17 should require that, at the beginning of proceedings, a mandatory timetable is outlined for each stage of the process, making available sanctions for non-compliance [82]. Such deadlines will serve to increase the legal security and certainty of competition proceedings.

These reforms go a considerable way towards improving the fairness of antitrust proceedings. But, under them the Commission still retains considerable discretion. Moreover, the criminological analogy indicates that the simple

incorporation of criminal law defence rights will do little on its own to ameliorate present problems [83]. This suggests that other controls upon the Commission's discretion are required to prevent DGIV overwhelming defendants and to ensure proper respect for due process. Thus, a further option, which builds more immediate and effective accountability into the system, should be considered. Requiring the Commission, as prosecutor, to substantiate its case before the CFI seems an appropriate solution. Dissolving the Commission's monolithic authority would curtail DGIV's present use of the 'law as a resource' in defining and controlling the scope of Art.85, in manipulating the quality and quantitiy of evidence required to prove an offence and in permitted discrepancies between the SO and the decision. Quite simply, this separation of powers would encourage competition issues to be dealt with as legal decisions based on legal principles. Allowing the CFI to audit DGIV's evidence in this way would enhance considerably the substantive soundness, legal certainty and transparency of competition proceedings and thereby assist in restoring antitrust's credibility and integrity [84]. Indeed, the CFI have already shown themselves extremely capable in this respect.

Admittedly, there are some problems in this approach. For instance, it may result in simply displacing discretion from one institution to another. There is the additional danger that the CFI may atrophy like the Restrictive Practices Court in the UK. The separation of prosecution and trial powers and the possibility of further review by the ECJ should assist in forestalling the former problem. The breadth of EC legislation should counteract the likelihood of formalism reducing the effectiveness of the Court's role. Certainly, the combination of broad legislation and the litigation of antitrust issues has not reduced the Court's position in the US. Moreover, whilst jurisdictions who enforce in a litigation setting have been shown to have their fair share of problems, the comparative analysis has also revealed that the difficulties encountered in the US, particularly in respect of defence rights, are notably fewer than under the monolithic discretion of the Commission. So, although it can be argued that this reform may not solve all the problems, the benefits it provides means that it is surely a major step in the right direction.

The problems created by the exclusive focus on political and pragmatic goals must also be addressed. The central problem is the ability of these objectives to manipulate the law for their exclusive benefit. This highlights the real difficulty with antitrust decision-making. Currently, antitrust decisions are an indeterminate mixture of law, economics, politics and a myriad of other extra-legal factors. This is a dangerous cocktail. Their undesirable impact on the integrity and credibility of antitrust is undeniable. Such consequences inevitably place the justice and justiciability of antitrust in grave doubt. But, they do not necessarily render the issues involved entirely non-justiciable. In other areas of law, courts can and do, with increasing frequency, deal with matters requiring not only an assessment of legal issues, but also economic and political factors. So, whilst antitrust is complex, and assessment difficult, it is not theoretically impossible to subject such matters to legal control - if only to a limited degree. Nevertheless, the influence of political and pragmatic factors on decision-making must be addressed. Ultimately, a decision must be made regarding the role of these goals in antitrust. If it is decided that the focus must remain exclusively on these objectives, then antitrust matters should be removed from the legal arena and should be treated as transparently political decisions. The continued integrity of the law requires that political and pragmatic aims cannot be allowed to masquerade as the law. Alternatively, if antitrust is to continue to be subject to legal control, then the influence of these goals must be acknowledged and confined. In order to control their impact, there must be a clear statement as to the role and weight of political and pragmatic factors in decision-making. Moreover, the Court must be prepared to incisively review such issues. Above all, a return to substantive soundness is vital. Antitrust must no longer be treated as an area of applied economics and politics, but as legal cases based on legal principles. Such reforms would make explicit the precise influence of political and pragmatic considerations on antitrust decision-making thereby facilitating accountability. A return to substantive soundness would significantly enhance legal certainty. Together with the reforms already outlined to curtail the Commission's monolithic discretion,

these suggestions should control the use of the 'law as a resource' for political and pragmatic gain, ultimately enhancing the credibility and integrity of EC antitrust.

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[11] T.S.Eliot *Four Quartets.*

[2] For further information on the influence of political and pragmatic goals on US antitrust, particularly its impact upon prosecutorial discretion, see Chs 2, 10 supra.

[3] For further on the conclusions of the study regarding the Commission's investigation choices in horizontal cartels, see Ch3 supra.

[4] The study's findings on defence rights at investigation are discussed in Ch3 supra.

[5] The findings of the research regarding enforcement choices and defence rights during the investigation of vertical cases are summarised at p 274 supra.

[6] The study's findings on US investigation methods are discussed in Ch10 supra.

[7] The study's findings regarding DGIV's prosecution decisions are summarised at p 104 supra.

[8] This treatment of the substantive elements of Art.85 is merely an extension of the Commission's initial approach to the definition of anti-competitive conduct discussed earlier in this chapter.

[9] The conclusions of the study on the defendant's right to disclosure are summmarised at p 144 supra.

[10] Thus, in access 'confidentiality' is construed broadly, whilst 'relevancy' is given a narrow interpretation. For further on this, see the discussion of access rights in horizontal cases in Ch4 supra.

[11] The study's findings regarding the prosecution of vertical cases is summarised at p 295 supra.

[12] For instance, that of 'export ban'.

[13] Particularly regarding the qualitative and quantitive criteria of selective distribution arrangements.

[14] For the conclusion of the study's findings on defence rights at prosecution in vertical agreements, see p 295 supra.

[15] The findings of the research on US prosecution are summarised at p 422 supra.

[16] For a summary of the research's findings on DGIV's powers at trial and sanctioning, see p 223 supra.

[17] Even where it does, this never amounts to more than a finding that part of the charge is not established.

[18] See p 235 supra for the study's conclusions on the classification and scope of defence rights at trial.

19 At trial, this principally relates to the activities of the HO and the Advisory Committee.

20 The findings of the research on in respect of sanctioning in vertical cases are summarised at p 352 supra.

21 See p 360 supra for a summary of the study's findings on defence rights at trial in vertical cases.

22 For a summary of the study's findings on US enforcement choices at trial, see p 424 supra.

23 It will be remembered that case construction exploits the flexibility of substantive legal concepts, evidential requirements and the choice of analytical format.

24 For the study's conclusions an DGIV's approach to plea-bargaining, negative clearance and individual exemptions in both horizontal and vertical cases, see Ch5 and Ch8 supra.

25 Except where otherwise stated, the following discussion refers to the Commission's approach to both horizontal and vertical cases.

26 Defence rights in horizontal and vertical plea-bargains, negatively cleared and individually exempted cases are assessed in detail in Chs 5 and 8 supra.

27 See here, the Commission's treatment of *LDPE*, *PVC BPCL/ICI* and *Synthetic Fibres* and the discussion on the individual exemption of crisis cartels in Ch5 supra.

28 US informal settlements are discussed in greater depth at p 433 supra.

29 The research's findings on the 'rule of law' evaluation are assessed in Ch9 supra.

30 The following discussion draws on Harding's comments in *EC Investigations and Sanctions : The Supranational Control of Business Delinquency* Leicester Unv. Press (1993) Ch10.

31 Harding *EC Investigations and Sanctions* at pp 128-130. McBarnet and Whelan in 'The Elusive Spirit of the Law : Formalism and the Struggle for Legal Control' *MLR* [1991] 848, also recognise the criminal nature of some 'economic' offences.

32 Harding *EC Investigations and Sanctions* at pp 137-138. Harding argues that the criminal law may not be an effective means of control as, so far, there is no evidence to show that the punitive level of fines has deterred potential offenders or has stigmatised those fined and resulted in censure from competitors or consumers.

33 Particularly with respect to the frequency with which the DG is forced to resort to contempt proceedings. See Appendix D for further on the UK approach. See also, Whish *Competition Law* Butterworths (1993) Chs 3-5 ; Agnew *Competition Law* Allen and Unwin (1985) Ch7 ; O'Brien 'Competition Policy in Britain : The Silent Revolution' *Antitrust Bulletin* [1982] 217 ; Pratt 'Changes in UK Competition Law : A Wasted Opportunity' *ECLR* [1994] ; D.Jacobs 'Competition Law' *BLR* [1982] 131 ; Frazer 'Defects and Effects - Competition Policy for the 1990s' *MLR* [1988] 493 ; Pitt 'Restrictive Trade Practices - Problems and Practice' *BLR* [1985] 291 ; Green *Commercial Agreements and Competition Law : Practice and Procedure in the UK and EEC* Graham and Trotman (1986) Chs 1-5 ; Swann,O'Brien, Maunders and Howe *Competition in British Industry* Unwin (1974) ; Merkin and Williams *Antitrust Policy in the United Kingdom and the EEC* Sweet and Maxwell (1984) ; Walker-Smith 'Collusion : Its Detection and Investigation' *ECLR* [1991] 71 ; Robertson 'Enforcement of the UK RTPA Legislation : Limitations and Legislative Proposals' *ECLR* [1992] 82 ; Lever 'UK Economic Regulation : Use and Abuse of the Law' *ECLR* [1992] 55, for further information on the UK approach and the problems encountered there.

34 Harding *EC Investigations and Sanctions* at pp 136-140.

35 These matters will be discussed shortly.

[36] On this, see particularly comments by Coppel 'Curbing the Ruling Passion : A New Force for Judicial Review in the European Commmunities' *ECLR* [1992] 143.

[37] See here, criticism by the House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO, at para 98 et seq.

[38] The JWP agrees with this, though the House of Lords Committee does not. See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 103-105.

[39] Many of the above criticisms are shared by Coppel in 'Curbing the Ruling Passion' ; Rasmussen *On Law and Policy in the European Court of Justice : A Comparative Study in Judicial Policymaking* Martinus Nijhoff (1986) and Cruz Vilaca 'The Court of First Instance of the European Communities : A Significant Step towards the Consolidation of the European Community as a Community Governed by the Rule of Law' *YBEL* [1990] 1. They are discussed more thoroughly in the 'rule of law' analysis.

[40] See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 18-24, which itself pointed out that it had first expressed concern in House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO, and that so far, their warnings had gone unheeded.

[41] In the EC, this outcome has further implications for the continued welfare of Community law.

[42] As acknowledged in Ch1 supra, this rather depressing account of the English criminal justice system forms only one view of the process. Nevertheless, it is the opinion of many leading academics.

[43] Principally, the following discussion draws on research into health and safety and enviromental regulations in the UK. For a more detailed discussion of the subject areas see : Hawkins *Enviroment and Enforcement : Regulation and the Social Defintion of Pollution* Clarendon Press (1984) ; Hawkins '"Fatcats" and Prosecution in a Regulatory Agency : A Footnote on the Social Construction of Risk' *Law and Policy* [1989] 370 ; Hutter *The Reasonable Arm of the Law ? The Law Enforcement Procedures of Enviromental Health Officers* OU Press (1988) ; Hutter 'Variations in Regulatory Styles' *Law and Policy* [1989] 153 ; Richardson *Policing Pollution : A Study of Regulation and Enforcement* Clarendon Press (1982) ; Lloyd-Bostock 'The Psychology of Routine Discretion : Accident Screening by British Factory Inspectors' *Law and Policy* [1992] 45 ; Hawkins and Hutter 'The Response of Business to Social Regulation in England and Wales : An Enforcement Perspective' *Law and Policy* [1993] 199. Research on the exercise of Supplementary Benefit regulations reveals a similar enforcement approach with similar problems and consequences. On this, see ADLER and ASQUITH (Eds) *Discretion and Welfare* London (1981) ; ADLER and BRADLEY (Eds) *Justice, Discretion and Poverty - Supplementary Benefit Appeal Tribunals in Britain* Professional Books (1975). For a more general discussion of law and regulation, see McBarnet and Whelan 'The Elusive Spirit of the Law' ; R.Baldwin 'Why Rules Don't Work' *MLR* [1990] 321 ; Cotterrell 'Feasible Regulation for Democracy and Social Justice' *Jo Law and Society* [1988] 5.

[44] For further discussion of the political influences on decision-making, see eg Hawkins '"Fatcats" and Prosecution in a Regulatory Agency' at p 378 ; R.Baldwin 'Why Rules Don't Work' at pp 334-335 and R.Baldwin and McCrudden *Regulation and Public Law* Wiedenfeld and Nicolson (1987) at p 54.

[45] For further see Hawkins and Hutter 'The Response of Business to Social Regulation in England and Wales' at pp 200-209 ; Hawkins '"Fatcats" and Prosecution in a Regulatory Agency' at pp 374-377 ; Hawkins *Enviroment and Enforcement* and Hutter *The Reasonable Arm of the Law ?* in general.

[46] See Hawkins and Hutter 'The Response of Business to Social Regulation in England and Wales' at pp 204-209.

[47] See Hawkins *Enviroment and Enforcement* ; Hutter *The Reasonable Arm of the Law ?* ; Richardson *Policing Pollution* in general. who all deal with the impact of these factors on decision-making in much greater detail. R.Baldwin in 'Why Rules Don't Work', discusses the relationship between rule type and political and pragmatic factors and their impact upon the efficacy of enforcement.

[48] Of course, where political and pragmatic needs demand it, cases can be constructed as serious violations requiring formal prosecution. This normally occurs in situations where there is a clear 'per se' type breach of the law. On this, see Hawkins '"Fatcats" and Prosecution in a Regulatory Agency' at pp 376-385.

[49] Hawkins and Hutter 'The Response of Business to Social Regulation in England and Wales' at p 207, note the importance of bargaining and bluff as enforcement tools. See also on this use of the 'law as a resource', Hawkins *Enviroment and Enforcement* at p 93 et seq ; Hutter *The Reasonable Arm of the Law ?* ; Richardson *Policing Pollution.*

[50] See Hawkins and Hutter 'The Response of Business to Social Regulation in England and Wales' ; Hutter *The Reasonable Arm of the Law ?* ; Hawkins *Enviroment and Enforcement* in general.

[51] See McBarnet and Whelan 'The Elusive Spirit of the Law' in general.

[52] McBarnet and Whelan 'The Elusive Spirit of the Law' : at p 851, term this discretionary appproach "anti-formalism".

[53] Chiefly, there has been tension between regulators, regulatees, legislators and other involved professionals. McBarnet and Whelan 'The Elusive Spirit of the Law' at p 856 et seq, discuss these problems and criticisms in greater depth.

[54] See McBarnet and Whelan 'The Elusive Spirit of the Law' at p 860 et seq. In addition, other critics have discussed broader concerns regarding the inadequacies of an approach based on excessive discretion. On this, see K.C.Davis *Discretionary Justice* Louisiana (1969) ; R.Baldwin and Hawkins 'Discretionary Justice : Davis Reconsidered' *PL* [1984] 570 ; Jowell 'The Legal Control of Administrative Discretion' *PL* [1973] 178 ; Jowell 'The Rule of Law Today' in JOWELL and OLIVER (Eds) *The Changing Constitution* Clarendon Press (1989) ; Diver 'Policymaking Paradigms in Administrative Law' *Harvard LR* [1981] 393 ; Galligan *Discretionary Powers : A Legal Study of Official Discretion* Clarendon Press (1986). These issues will be returned to when the justiciability of antitrust is addressed later in the chapter.

[55] In particular, the striking similarity of approach between UK restrictive trade practices enforcement and the enforcement of other regulations within the UK should be noted. For further on the application of UK antitrust, see Appendix D.

[56] The issue of justiciability is dealt with in much greater depth by Galligan *Discretionary Powers* at pp 240-251 ; R.Baldwin and Hawkins 'Discretionary Justice' at p 591 et seq ; Horowitz *The Courts and Social Policy* Washington (1977) ; Jowell 'The Legal Control of Administrative Discretion' at pp 200 et seq. Jowell, in his discussion, distinguishes between strategic issues of whether legal techniques will prove effective means of achieving certain ends and functional issues of whether it is possible to submit any given task to legal control. For a consideration of justiciability in the context of antitrust, see Stevens and Yamey *The Restrictive Practices Court : A Study of the Judicial Process and Economic Policy* Wiedenfeld and Nicolson (1965) Ch3 and Korah 'EEC Competition Policy - Legal Form or Economic Efficiency *CLP* [1986b] 85. See also Ch1 supra, for a preliminary discussion of justiciability and antitrust. For a judicial examination of justiciability , see *AG v Gouriet* [1978] AC 435 at pp 491,512,524 ; *CCSU v Minister for Civil Service* [1984] 3 WLR 1174 at p 1183 et seq.

[57] For further consideration of this, see Jowell 'The Legal Control of Administrative Discretion' at pp 213-215 ; R.Baldwin and Hawkins 'Discretionary Justice' at pp 591-592 ; Galligan *Discretionary Powers* at p 249.

[58] See also, the discussion in Appendix C regarding the amorphous and contoversial nature of the concept of competition. It must be admitted here as Fuller pointed out in 'The Forms and Limits of Adjudication' *Harvard LR* [1978] 353, that most problems are to some degree polycentric as their solution is likely in some way to affect the basis of future decisions.

[59] See Stevens and Yamey *The Restrictive Practices Court* at pp 42-50, who doubt the justiciability of such public interest decisions, arguing that adjudicative processes are ill-equipped to deal with such matters. Korah in 'EEC Competition Policy' [1986b] at pp 91, 103, also questions judges' ability to decide and review economic issuesin complex markets. See also, Korah *Competition Law in Britain and the Common Market* Martinus Nijhoff (1982a) at paras 1.4, 5.2, 7.2 and Rutherford 'Restraint of Trade - The Public interest' *MLR* [1972] 651, who also comment on the justiciability of antitrust issues.

60 On this point, see Galligan *Discretionary Powers* at pp 244-246 ; R.Baldwin and Hawkins 'Discretionary Justice' at pp 592-595.

61 On this latter issue, see R.Baldwin 'Why Rules Don't Work', who explores the nexus between rule type and enforcement strategy employed. He concludes that rule type does affect the efficacy of enforcement, and that the role of rules in enforcement and the choice of rule type are affected by a number of factors including the type of regulatee, the type of hazard and the preferred enforcement strategy.

62 See comments particularly by : Whish *Competition Law* Chs 3-5 ; Agnew *Competition Law* Ch7 ; O'Brien 'The Silent Revolution' ; Pratt 'Changes in UK Competition Law' ; D.Jacobs 'Competition Law' ; Frazer 'Defects and Effects - Competition Policy for the 1990s' ; Pitt 'Restrictive Trade Practices' ; Green *Commercial Agreements and Competition Law* Chs 1-5 ; Swann, O'Brien, Maunders and Howe *Competition in British Industry* ; Robertson 'Enforcement of the UK RTPA Legislation' ; Lever 'UK Economic Regulation', for further discussion of the UK approach and the problems encountered there.

63 This inclination to do so within the formalistic context of UK competition law has been explored in particular by O'Brien in 'The Silent Revolution'. See also, the discussion of UK enforcement in Appendix D.

64 The extensive literature on this subject broadly divides into a 'rules versus discretion' debate which critically examines the advantages and disadvantages of each appproach. For further, see eg Galligan *Discretionary Powers* ; McCormick *Legal Reasoning and Legal Theory* Oxford Unv. Press (1978) ; Jowell 'The Legal Control of Administrative Discretion' ; R.Baldwin and Hawkins 'Discretionary Justice' ; Diver 'Policymaking Paradigms in Administrative Law'.

65 See eg, Galligan *Discretionary Powers* at pp 142-152 ; McCormick *Legal Reasoning and Legal Theory* at pp 268-269.

66 See Galligan *Discretionary Powers* at pp 244-246 ; R.Baldwin and Hawkins 'Discretionary Justice' at pp 592-595.

67 See Galligan *Discretionary Powers* at pp 142-152 ; Jowell 'The Legal Control of Administrative Discretion' at pp 186-192 and R.Baldwin and Hawkins 'Discretionary Justice' ; McCormick *Legal Reasoning and Legal Theory* in general.

68 See particularly, Jowell 'The Legal Control of Administrative Discretion' at p 186 and Galligan *Discretionary Powers* at pp 143-145. The research also acknowledges that purposes, as well as means, can be criticised as arbitrary.

69 See particularly, Galligan *Discretionary Powers* at pp 146-147.

70 McCormick *Legal Reasoning and Legal Theory* at pp 268-269.

71 What Diver in 'Policymaking Paradigms in Administrative Law' at p 428 terms "optimal discretion". His approach is criticised by R.Baldwin and Hawkins 'Discretionary Justice' at p 593 et seq.

72 See in general, K.C.Davis *Discretionary Justice* ; Gifford 'Discretionary Decision-Making in the Regulatory Agencies : A Conceptual Framework' *Southern California LR* [1983] 101 ; Galligan *Discretionary Powers.* Davis's antipathy towards discretion is critically reviewed by R.Baldwin and Hawkins in 'Discretionary Justice', although they too recognise the need for structuring and control of discretion.

73 This has the unequivocal support of the House of Lords Select Committee. See House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 102, 108, 114, 142.

74 Such warrants would be at the discretion of the CFI. Reforms along these lines have been suggested on several occasions in the last 15 years by the House of Lords Select Comittee. See House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at paras 21-25 ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at paras 55-67 ; House of Lords Select Committee on the European

Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 113-115. The Select Committee envisages that the requirement of judicial warrants would make explicit a right of appeal at that stage.

75 Continued disputes on this issue could be dealt with by the Hearing Officer with appeal to the CFI.

76 The House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 113-115, agrees with reforms regarding legal representation and legal professional privilege.

77 This reform has widespread support. Again, the House of Lords Select Committee has long advocated the need for an 'independent person' to deal with such matters. See House of Lords Select Committee on the European Communities *8th Report, Competition Practice* HL Papers 1981/82 (91) HMSO at paras 27-29 ; House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 109-110. Joshua 'Balancing the Public Interest : Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedure' *ECLR* [1994] 68 at p 79 and Doherty 'Playing Poker with the Commission : Rights of Access to the Commission's File in Competition Cases' *ECLR* [1994] 8 at p 12, envisage a similar solution.

78 The House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 124-125, whilst insisting that a sentencing tariff would be detrimental, advocated greater transparency in the sanctioning assessment.

79 The House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 111-112, advocated that more HO posts be established, an increase in the HO's powers and formal review of the HO's decisions.

80 The House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 121-123, doubted the Advisory Committee's ability to enhance the fairness or transparency of proceedings and advocated that the Committee should be involved in decision-making in important competition cases. Here, disclosure of the Committee's Report, at least to the parties involved, was envisaged.

81 Van Bael 'Transparency of EC Commission Procedings' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 192 at p 198, advocates a similar solution. The House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 116-118, calls for greater clarity and more frequent publication of comfort letters.

82 The House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 107-108, has strongly urged for the introduction of mandatory deadlines. It envisages that fines or discontinuance of proceedings will be employed as sanctions. The House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at para 67, in response to delays following inspections, advocated that firms should be notified of the results of that investigation within one year of the inspection. Goyder 'User Friendly Competition Law' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 1 at p 3, has also urged the use of time limits on decision-making.

83 Cf Green 'Evidence and Proof in EC Competition Cases' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 127, who advocates the adoption of such defence rights as a means of solving present concerns.

84 Under this approach, interlocutory issues such as disclosure, could be dealt with by the President of the CFI or by the HO, who at trial, would file his Report to the Court. The House of Lords Select Committee on the European Communities *1st Report, Enforcement of Community Competition Rules* HL Papers 1993/94 (7,7-1) HMSO at paras 104-105, has called for greater control on DGIV's discretion and reform of Reg.17. But, it does not think that the separation of powers is essential. However, at paras 102-103, it approves of an extension to the CFI's supervisory role. Cruz Vilaca in 'The Court of First Instance' at pp 55-56, suggests various

improvements aimed at ensuring greater and more effective control by the courts, including the creation of specialised Community courts dealing with highly technical issues. Coppel 'Curbing the Ruling Passion' at p 147, advocates greater accountability by the introduction of a new EC watchdog body akin to the House of Lords Select Committee to oversee the day to day activities of the Commission. Both Goyder 'User Friendly Competition Law' at p 1 and Wood 'User Friendly Competition Law in the United States' in SLOT and MCDONNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 6 at pp 6-7, urge the need in antitrust to return to dealing with antitrust issues as legal decisions based on legal principles.

CHAPTER TWELVE

FINAL CONCLUSION

"Integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful." [1]

The study has shown that the nature of antitrust enforcement is as much political and pragmatic as it is criminal. But, the research has raised some fundamental concerns regarding the justice and justiciability of the present political and pragmatic focus of antitrust. Both the examination of the current consequences and the future implications of this present course have made explicit the dangers of an approach where such political and pragmatic ends are permitted to justify the means. Here, the study has demonstrated that alone the exclusive focus on political and pragmatic goals and the Commission's use of its monolithic discretion pose fundamental problems. Together their impact on the justice of antitrust enforcement is immense ; the implications alarming. Under their guidance, due process, substantive soundness and even the 'rule of law' have been sacrificed to achieve the 'higher' goal of market integration. As a result, discrimination, uncertainty and inequity are the hallmarks of EC antitrust enforcement. Quite simply, political and pragmatic ends have been achieved at the expense of justice. The study has also illustrated that these same factors also impact upon justiciability, placing it too in considerable jeopardy. Overall, the research suggests that if this present approach to EC competition law is pursued to its ultimate conclusion, ironically the very aim of achieving integration may result in the disintegration of the Single Market, by irrevocably impairing the credibility and integrity of EC competiton law in particular and Community law in general.

For the sake of both the justice and justiciability of EC antitrust, changes must be made. In so doing, the inherently political and pragmatic nature of antitrust must be recognised fully. Such is their present influence that the only equitable course may be to remove antitrust from the legal arena entirely. Alternatively, in order to salvage the integrity and credibility of the system, reforms to the Commission's monolithic

discretion and the influence of political and pragmatic considerations on enforcement, along the lines suggested, are imperative. Most importantly, an immediate and fundamental overhaul of Reg.17 is vital. Much also rests on the Court's approach to review. The CFI's continued willingness to audit Commission decision-making incisively is crucial.

Ironically, whether reform occurs depends on political and pragmatic considerations. Several political and pragmatic factors militate against change. Unsurprisingly, the Commission has demonstrated a marked reluctance towards reform of Reg.17. Of course, it has much to gain, both politically and pragmatically, from continuing its present approach. The time, expense and the required involvement of the Council in major reform have also been quoted as obstacles. This is disquieting. If the pursuit of fairness is too much trouble, the wisdom of continuing to support an institution which insists and thrives upon a policy of disparity and injustice must be in grave doubt. If EC antitrust is to be a just and credible system, there is no option but to reform. In the end, the choice is a simple one. Do we want a antitrust system which delivers 'politics and pragmatism' or justice ?.

FINIS

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1 Samuel Johnson *Rasselas.*

APPENDIX A

LEGISLATION AND ENFORCEMENT

EC

A)LEGISLATION

1)Article 85 Treaty of Rome 1957

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:
   (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (b) limit or control production, markets, technical development, or investment;
   (c) share markets or sources of supply;
   (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decision prohibited pursuant or this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   - any agreement or category of agreements between undertakings;
   - any decision or category of decisions by associations of undertakings;
   - any concerted practice or category of concerted practices;

   which contributes to improving the production of distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:
   (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
   (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

2)Regulation 17/62

Article I - Basic provision

Without prejudice to Articles 6, 7 and 23 of this Regulation, agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty and the abuse of a dominant position in the market, within the meaning of Article 86 of the Treaty, shall be prohibited, no prior decision to that effect being required.

Article 2 - Negative clearance

Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article 85(1) or Article 86 of the Treaty for action on its part in respect of an agreement, decision or practice.

Article 3 - Termination of infringements

1. Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or Article 86 of the Treaty, it may by decision require the undertakings or associations of undertakings concerned to bring such infringement to an end.

2. Those entitled to make application are:
   (a) Member States;
   (b) natural or legal persons who claim a legitimate interest.

3. Without prejudice to the other provisions of this Regulation, the Commission may, before taking a decision under paragraph 1, address to the undertakings or associations of undertakings concerned recommendations for termination of the infringement.

Article 4 - Notification of new agreements, decisions and practices

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which come into existence after the entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) must be notified to the Commission. Until they have been notified, no decision in application of Article 85(3) may be taken.

2. Paragraph I shall not apply to agreements, decisions or concerted practices where:
   (1) the only parties thereto are undertakings from one Member State and the agreements, decisions or practices do not relate either to imports or to exports between Member States;
   (2) not more than two undertakings are party thereto, and the agreements only:
      (a) restrict the freedom of one party to the contract in determining the prices or conditions of business upon which the goods which he has obtained from the other party to the contract may be resold; or
      (b) impose restrictions on the exercise of the rights of the assignee or user of industrial property rights - in particular

patents, utility models, designs or trade marks - or of the person entitled under a contract to the assignment, or grant, of the right to use a method of manufacture or knowledge relating to the use and to the application of industrial processes;

(3) they have as their sole object:

(a) the development or uniform application of standards or types; or

(b) joint research and development;

(c) specialisation in the manufacture of products, including agreements necessary for the achievement thereof;

-where the products which are the object of specialisation do not, in a substantial part of the common market, represent more than 15 per cent of the volume of business done in identical products or those considered by the consumers to be similar by reason of their characteristics, price and use, and

-where the total annual turnover of the participating undertakings does not exceed 200 million units of account.

These agreements decisions and concerted practices may be notified to the Commission.

Article 5 - Notification of existing agreements, decisions and practices

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty which are in existence at the date of entry into force of this Regulation and in respect of which the parties seek application of Article 85(3) shall be notified to the Commission before 1 November 1962. However, notwithstanding the foregoing provisions, any agreements, decisions and concerted practices to which not more than two undertakings are party shall be notified before 1 February 1963.

2. Paragraph 1 shall not apply to agreements, decisions or concerted practices falling within Article 4(2); these may be notified to the Commission.

Article 6 - Decisions pursuant to Article 85(3)

1. Whenever the Commission takes a decision pursuant to Article 85(3) of the Treaty, it shall specify therein the date from which the decision shall take effect. Such date shall not be earlier than the date of notification.

2. The second sentence of paragraph 1 shall not apply to.agreements, decisions or concerted practices falling within Article 4(2) and Article 5(2), nor to those falling within Article 5(1) which have been notified within the time limit specified in Article 5(1).

Article 7 - Special provisions for existing agreements, decisions and practices

1. Where agreements, decisions and concerted practices in existence at the date of entry into force of this Regulation and notified within the limits specified in Article 5(1) do not satisfy the requirements of Article 85(3) of the Treaty and the undertakings or associations of undertakings concerned cease to give effect to them or modify them in such manner that they no longer fall within the prohibition contained in Article 85(1) or that they satisfy the requirements of Article 85(3), the prohibition contained in Article 85(1) shall apply only for a period fixed by the Commission. A decision by the Commission pursuant to the foregoing sentence shall not apply as

against undertakings and associations of undertakings which did not expressly consent to the notification.

2. Paragraph 1 shall apply to agreements, decisions and concerted practices falling within Article 4(2) which are in existence at the date of entry into force of this Regulation if they are notified before 1 January 1967.

Article 8 - Duration and revocation of decisions under Article 85(3)

1. A decision in application of Article 85(3) of the Treaty shall be issued for a specified period and conditions and obligations may be attached thereto.

2. A decision may on application be renewed if the requirements of Article 85(3) of the Treaty continue to be satisfied.

3. The Commission may revoke or amend its decision or prohibit specified acts by the parties:

(a) where there has been a change in any of the facts which were basic to the making of the decision;

(b) where the parties commit a breach of any obligation attached to the decision;

(c) where the decision is based on incorrect information or was induced by deceit;

(d) where the parties abuse the exemption from the provisions of Article 85(1) of the Treaty granted to them by the decision.

In cases to which subparagraphs (b), (c) or (d) apply, the decision may be revoked with retroactive effect.

Article 9 - Powers

1. Subject to review of its decision by the Court of Justice, the Commission shall have sole power to declare Article 85(1) inapplicable pursuant to Article 85(3) of the Treaty.

2. The Commission shall have power to apply Article 85(1) and Article 86 of the Treaty; this power may be exercised notwithstanding that the time limits specified in Article 5(1) and in Article 7(2) relating to notification have not expired.

3. As long as the Commission has not initiated any procedure under Articles 2, 3 or 6, the authorities of the Member States shall remain competent to apply Article 85(1) and Article 86 in accordance with Article 88 of the Treaty; they shall remain competent in this respect notwithstanding that the time limits specified in Article 5(1) and in Article 7(2) relating to notification have not expired.

Article 10 - Liaison with the authorities of the Member States

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3).

2. The Commission shall carry out the procedure set out in paragraph 1 in close and constant liaison with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure.

3. An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85(3) of the Treaty.

4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official to represent it who, if prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting convened by the Commission; such meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the consultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 11 - Requests for information

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.

6. The Commission shall at the same time forward a copy of its decision to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

Article 12 - Inquiry into sectors of the economy

1. If in any sector of the economy the trend of trade between Member States, price movements, inflexibility of prices or other circumstances suggest that in the economic sector concerned competition is being restricted or distorted within the common market, the Commission may decide to conduct a general inquiry into that economic sector and in the course thereof may request undertakings in the sector concerned to supply the information necessary for giving effect to the principles formulated in Articles 85 and 86 of the Treaty and for carrying out the duties entrusted to the Commission.

2. The Commission may in particular request every undertaking or association of undertakings in the economic sector concerned to communicate to it all agreements, decisions and concerted practices which are exempt from notification by virtue of Article 4(2) and Article 5(2).

3. When making inquiries pursuant to paragraph 2, the Commission shall also request undertakings or groups of undertakings whose size suggests that they occupy a dominant position within the common market or a substantial part thereof to supply to the Comission such particulars of the structure of the undertakings and of their behaviour as are requisite to an appraisal of their position in the light of Article 86 of the Treaty.

4. Article 10(3) to (6) and Articles 11, 13 and 14 shall apply correspondingly.

Article 13 - Investigations by the authorities of the Member States

1. At the request of the Commission, the competent authorities of the Member States shall undertake the investigations which the Commission considers to be necessary under Article 14(1), or which it has ordered by decision pursuant to Article 14(3). The officials of the competent authorities of the Member States responsible for conducting these investigations shall exercise their powers upon production of an authorisation in writing issued by the competent authority of the Member State in whose territory the investigation is to be made. Such authorisation shall specify the subject matter and purpose of the investigation.

2. If so requested by the Commission or by the competent authority of the Member State in whose territory the investigation is to be made, the officials of the Commission may assist the officials of such authorities in carrying out their duties.

Article 14 - Investigating powers of the Commission

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may undertake all necessary investigations into undertakings and associations of undertakings. To this end the officials authorised by the Commission are empowered:

(a) to examine the books and other business records;
(b) to take copies of or extracts from the books and business records;
(c) to ask for oral explanations on the spot;
(d) to enter any premises, land and means of transport of undertakings.

2. The officials of the Commission authorised for the purpose of these investigations shall exercise their powers upon production of an authorisation in writing specifying the subject matter and purpose of the investigation ancl the penalties provided for in Article 15(1)(c) in cases where production of the required books or other business records is incomplete. In good time before the investigation, the Commission shall inform the competent authority of the Member State in whose territory the same is to be made of the investigation and of the identity of the authorised officials.

3. Undertakings and associations of undertakings shall submit to investigations ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the investigation, appoint the date on which it is to begin and indicate the penalties provided for in Article 15(1)(c) and Article 16(1)(d) and the right to have the decision reviewed by the Court of Justice.

4. The Commission shall take decisions referred to in paragraph 3 after consultation with the competent authority of the Member State in whose territory the investigation is to be made.

5. Officials of the competent authority of the Member State in whose territory the investigation is to be made may, at the request of such authority or of the Commission, assist the officials of the Commission in carrying out their duties.

6. Where an undertaking opposes an investigation ordered pursuant to this Article, the Member State concerned shall afford the necessary assistance to the officials authorised by the Commission to enable them to make their investigation. Member States shall, after consultation with the Commission, take the necessary measures to this end before 1 October 1962.

Article 15 - Fines

1. The Commission may by decision impose on undertakings or associations of undertakings fines of from 100 to 5000 units of account where, intentionally or negligently:

(a) they supply incorrect or misleading information in an application pursuant to Article 2 or in a notification pursuant to Articles 4 or 5; or

(b) they supply incorrect information in response to a request made pursuant to Article 11(3) or (5) or to Article 12, or do not supply information within the time limit fixed by a decision taken under Article 11(5); or

(c) they produce the required books or other business records in incomplete form during investigations under Article 13 or 14, or refuse to submit to an investigation ordered by decision issued in implementation of Article 14(3).

2. The Commission may by decision impose on undertakings or associations of undertakings fines of from 1000 to 1,000,000 units of account, or a sum in excess thereof but not exceeding 10% of the turnover in the preceding business year of each of the undertakings participating in the infringement where, either intentionally or negligently:

(a) they infringe Article 85(1) or Article 86 of the Treaty; or

(b) they commit a breach of any obligation imposed pursuant to Article 8(1).

In fixing the amount of the fine, regard shall be had both to the gravity and to the duration of the infringement.

3. Article 10(3) to (6) shall apply.

4. Decisions taken pursuant to paragraphs 1 and 2 shall not be of a criminal law nature.

5. The fines provided for in paragraph 2(a) shall not be imposed in respect of acts taking place:

(a) after notification to the Commission and before its decision in application of Article 85(3) of the Treaty, provided they fall within the limits of the activity described in the notification;

(b) before notification and in the course of agreements, decisions or concerted practices in existence at the date of entry into force of this Regulation, provided that notification was effected within the time limits specified in Article 5(1) and Article 7(2).

6. Paragraph 5 shall not have effect where the Commission has informed the undertakings concerned that after preliminary examination it is of opinion that Article 85(1) of the Treaty applies and that application of Article 85(3) is not justified.

Article 16 - Periodic penalty payments

1. The Commission may by decision impose on undertakings or associations of undertakings periodic penalty payments of from 50 to 1000 units of account per day, calculated from the date appointed by the decision, in order to compel them:

(a) to put an end to an infringement of Article 85 or 86 of the Treaty, in accordance with a decision taken pursuant to Article 3 of this Regulation;

(b) to refrain from any act prohibited under Article 8(3);

(c) to supply complete and correct information which it has requested by decision taken pursuant to Article 11(5);

(d) to submit to an investigation which it has ordered by decision taken pursuant to Article 14(3).

2. Where the undertakings or associations of undertakings have satisfied the obligation which it was the purpose of the periodic penalty payment to enforce, the Commission may fix the total amount of the periodic penalty payment at a lower figure than that which would arise under the original decision.

3. Article 10(3) to (6) shall apply.

Article 17 - Review by the Court of Justice

The Court of Justice shall have unlimited jurisdiction within the meaning of Article 172 of the Treaty to review decisions whereby the Commission has fixed a fine or periodic penalty payment; it may cancel, reduce or increase the fine or periodic penalty payment imposed.

Article 18 - Unit of account

For the purposes of applying Articles IS to 17 the unit of account shall be that adopted in drawing up the budget of the Community in accordance with Articles 207 and 209 of the Treaty.

Article 19 - Hearing of the parties and of third persons

1. Before taking decisions as provided for in Articles 2, 3, 6, 7, 8, 1 5 and 16, the Commission shall give the undertakings or associations of undertakings concerned the opportunity of being heard on the matters to which the Commission has taken objection.

2. If the Commission or the competent authorities of the Member States consider it necessary, they may also hear other natural or legal persons. Applications to be heard on the part of such persons shall, where they show a sufficient interest, be granted.

3. Where the Commission intends to give negative clearance pursuant to Article 2 or take a decision in application of Article 85(3) of the Treaty, it shall publish a summary of the relevant application or notification and invite all interested third parties to submit their observations within a time limit which it shall fix being not less than one month. Publication shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 20 - Professional secrecy

1. Information acquired as a result of the application of Articles 11, 12, 13 and 14 shall be used only for the purpose of the relevant request or investigation.

2. Without prejudice to the provisions of Articles 19 and 21, the Commission and the competent authorities of the Member States, their officials and other servants shall not disclose information acquired by them as a result of the application of this Regulation and of the kind covered by the obligation of professional secrecy.

3. The provisions of paragraphs 1 and 2 shall not prevent publication of general information or surveys which do not contain information relating to particular undertakings or associations of undertakings.

Article 21 - Publication of decisions

1. The Commission shall publish the decisions which it takes pursuant to Articles 2, 3, 6, 7 and 8.

2. The publication shall state the names of the parties and the main content of the decision; it shall have regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 22 - Special provisions

1. The Commission shall submit to the Council proposals for making certain categories of agreement, decision and concerted practice falling within Article 4(2) or Article 5(2) compulsorily notifiable under Article 4 or 5.

2. Within one year from the date of entry into force of this Regulation, the Council shall examine, on a proposal from the Commission, what special provisions might be made for exempting from the provisions of this Regulation agreements, decisions and concerted practices falling within Article 4(2) or Article 5(2).

Article 23 - Transitional provisions applicable to decisions of authorities of the Member States

1. Agreements, decisions and concerted practices of the kind described in Article 85(1) of the Treaty to which, before the entry into force of this Regulation, the competent authority of a Member State has declared Article 85(1) to be inapplicable pursuant to Article 85(3) shall not be subject to compulsory notification under Article 5. The decision of the competent authority of the Member State shall be deemed to be a decision within the meaning of Article 6; it shall cease to be valid upon expiration of the period fixed by such authority but in any event not more than three years after the entry into force of this Regulation. Article 8(3) shall apply.

2. Applications for renewal of decisions of the kind described in paragraph 1 shall be decided upon by the Commission in accordance with Article 8(2).

Article 24 - Implementing provisions

The Commission shall have power to adopt implementing provisions concerning the form, content and other details of applications pursuant to Articles 2 and 3 and of notifications pursuant to Articles 4 and 5, and concerning hearings pursuant to Article 19(1) and (2).

Article 25

1. As regards agreements, decisions and concerted practices to which Article 85 of the Treaty applies by virtue of accession, the date of accession shall be substituted for the date of entry into force of this regulation in every place where reference is made in this Regulation to this latter date.

2. Agreements, decisions and concerted practices existing at the date of accession to which Article 85 of the Treaty applies by virtue of.accession shall be notified pursuant to Article 5(1) or Article 7(1) and (2) within six months from the date of accession.

3. Fines under Article 15(2)(a) shall not he imposed in respect of any act prior to notification of the agreements, decisions and practices to which paragraph 2 applies and which have been notified within the period therein specified.

4. New Member States shall take the measures referred to in Article 14(6) within six months from the date of accession after consulting the Commission.

5. The provisions of paragraphs (1) to (4) above still apply in the same way in the case of accession of the Hellenic Republic, the Kingdom of Spain and of the Portuguese Republic.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 6 February 1962.

3)Regulation 99/63

on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17

Article 1

Before consulting the Advisory Committee on Restrictive Practices and Monopolies, the Commission shall hold a hearing pursuant to Article 19(1) of Regulation No 17.

Article 2

1. The Commission shall inform undertakings and associations of undertakings in writing of the objections raised against them. The communication shall be addressed to each of them or to a joint agent appointed by them.

2. The Commission may inform the parties by giving notice in the *Official Journal of the European Communities,* if from the circumstances of the case this appears appropriate, in particular where notice is to be given to a number of undertakings but no joint agent has been appointed. The notice shall have regard to the legitimate interest of the undertakings in the protection of their business secrets.

3. A fine or a periodic penalty payment may be imposed on an undertaking or association of undertakings only if the objections were notified in the manner provided for in paragraph 1.

4. The Commission shall when giving notice of objections fix a time limit up to which the undertakings and associations of undertakings may inform the Commission of their views.

Article 3

1. Undertakings and associations of undertakings shall, within the appointed time limit, make known in writing their views concerning the objections raised against them.

2. They may in their written comments set out all matters relevant to their defence.

3. They may attach any relevant documents in proof of the facts set out. They may also propose that the Commission hear persons who may corroborate those facts.

Article 4

The Commission shall in its decisions deal only with those objections raised against undertakings and associations of undertakings in respect of which they have been afforded the opportunity of making known their views.

Article 5

If natural or legal persons showing a sufficient interest apply to be heard pursuant to Article 19(2) of Regulation No 17, the Commission shall afford them the opportunity of making known their views in writing within such time limit as it shall fix.

Article 6

Where the Commission, having received an application pursuant to Article 3(2) of Regulation No 17, considers that on the basis of the information in its possession there are insufficient grounds for granting the application, it shall inform the applicants of its reasons and fix a time limit for them to submit any further comments in writing.

Article 7

1. The Commission shall afford to persons who have so requested in their written comments the opportunity to put forward their arguments orally, if those persons show a sufficient interest or if the Commission proposes to impose on them a fine or periodic penalty payment.

2. The Commission may likewise afford to any other person the opportunity of orally expressing his views.

Article 8

1. The Commission shall summon the persons to be heard to attend on such date as it shall appoint.

2. It shall forthwith transmit a copy of the summons to the competent authorities of the Member States, who may appoint an official to take part in the hearing.

Article 9

1. Hearings shall be conducted by the persons appointed by the Commission for that purpose.

2. Persons summoned to attend shall appear either in person or be represented by legal representatives or by representatives authorised by their constitution. Undertakings and associations of undertakings may moreover be represented by a duly authorised agent appointed from among their permanent staff.

Persons heard by the Commission may be assisted by lawyers or university teachers who are entitled to plead before the Court of Justice of the European Communities in accordance with Article 17 of the Protocol on the Statute of the Court, or by other qualified persons.

3. Hearings shall not be public. Persons shall be heard separately or in the presence of other persons summoned to attend. In the latter case, regard shall be had to the legitimate interest of the undertakings in the protection of their business secrets.

4. The essential content of the statements made by each person heard shall be recorded in minutes which shall be read and approved by him.

Article 10

Without prejudice to Article 2(2), information and summonses from the Commission shall be sent to the addressees by registered letter with acknowledgement of receipt, or shall be delivered by hand against receipt.

Article 11

1. In fixing the time limits provided for in Articles 2, 5 and 6, the Commission shall have regard both to the time required for preparation of comments and to the urgency of the case. The time limit shall be not less than two weeks; it may be extended.

2. Time limits shall run from the day following receipt of a communication or delivery thereof by hand.

3. Written comments must reach the Commission or be dispatched by registered letter before expiry of the time limit. Where the time limit would expire on a Sunday or public holiday, it shall be extended up to the end of the next following working day. For the purpose of calculating this extension, public holidays shall, in cases where the relevant date is the date of receipt of written comments, be those set out in the Annex to this Regulation, and in cases where the relevant date is the date of dispatch, those appointed by law in the country of dispatch.

US

A)LEGISLATION [1]

The principal federal provisisons are contained in the Sherman Act 1890 (ShA), though these have been supplemented by other statutes, primarily the Clayton Act 1914 (CA) and the Federal Trade Commission Act 1914 (FTC Act). The provisions of each will be dealt with briefly. It should be noted here that there is considerable overlap and many anti-competitive practices violate more than one of these statutes.

1)Sherman Act 1890

S.1 Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by a fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

S.4 The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this act ; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violations shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as

soon as may be, to the hearing and determination of the case ; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

The ShA was the populist response to the anti-competitve abuses of the 'trusts' which monopolised many late 19th century US industries [2]. Section 1 ShA is sweeping in its prohibition declaring illegal "every contract, combination ... or conspiracy in restraint of trade" [3]. The very breadth of the Act has given rise to considerable ambiguity resulting in a century of debate, controversy and extensive litigation [4]. The Act creates both criminal and civil offences [5]. It is enforced by the Department of Justice (DOJ) who share civil enforcement with private parties seeking treble damages or equitable relief.

2)Federal Trade Commission Act 1914 (FTC Act)

S.5(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed tp prevent persons, partnerships or corporations...from using unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce.

(b) Whenever the Commission shall have reason to believe that any such person, partnership or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public, it shal issue and serve upon such person, partnership or corporation a complaint stating its charges in that respectand containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.

Whilst this Act is centrally concerned with the formation and operation of the Federal Trade Commission (FTC), s.5 declares unlawful "unfair methods of competition in commerce". The section is of considerable importance in widening the FTC's jurisdiction as it covers a broad range of conduct which would also violate the ShA [6]. Thus, under s.5, the FTC is able to pursue, as unfair methods of competition, restrictive practices which are in all but name ShA violations. In practice, s.5 is often employed where reatraints are not fully blown infringements of the ShA or CA, but are 'incipient' breaches which do not technically violate these Acts but do contravene fundamental US antitrust policies [7].

3)Clayton Act 1914 (CA)

The CA was passed in order to strenghen the existing provisions of the ShA. Unlike the ShA, the CA specifies certain practices which are considered anti-competitive regardless of whether or not they are contracts in restraint of trade, or whether they actually damage competition. Rather, the specified practices are prohibited if their effect may be to substantially lessen competition [8].

Two sections of the CA are broadly relevant to the scope of this research ; s.2 which declares unlawful price discrimination and s.3 which relates largely to exclusive dealing and tying arrangements. Both of these sections are subject to several qualifying provisions [9]. Initially, s.2 proved largely ineffective as it was drafted too narrowly so allowing price discrimination due to differences in eg quality, quantity or transportation costs. The Robinson-Patman Act 1936 amended this. It aimed to ensure price equalitywhere inequality of prices may substantially lessen competition by

prohibiting price discrimination where goods are sold for resale [10]. Section 3 applies to tying arrengements and vertical exclusive dealing and requirements contracts. It has been argued that different standards of legality apply under the ShA and CA. With regard to tying contracts, it is argued that there is a stricter standard under s.3 CA, as this section applies only to the tying of goods to other goods and is not applicable to services. However, recent decisions seem to view standards under both Acts as virtually identical [11]. Conversely, lower standards may apply under the CA to exclusive dealing and requirements contracts. Both Acts analyse these restraints under the rule of reason, but under the CA, the aim is to determine whether the effect may be to substantially lessen competition [12]. Thus, unlike the ShA, there is no requirement to demonstrate the present effect on competition. Despite this, the courts under s.3 CA, investigate fully the market context of the agreement and its effect on competition. As such, this approach is very similar to that under the ShA [13].

The provisions of the CA do not create criminal liabilty, but may be enforced through the civil courts or by the FTC through administrative proceedings before the Commission itself [14].

4)Federal and State Antitrust Laws

It should be noted that the statutes outlined above are federal laws and so can apply only where inter-state trade is involved [15]. However, this limitation has virtually been interpreted out of the legislation. Generally, this requirement is satisfied even if only one state is affected, provided competition is substantially impaired. Certainly, under the ShA, entirely local violations are actionable provided there is some actual or threatened effect on inter-state trade, whether of a direct or indirect nature [16].

Whilst this thesis has concentrated exclusively on the application of federal antitrust laws, it should be noted that many States have their own intra-state antitrust rules. Considerable differences in the strictness of the legislation and enforcement policies exists between States. Until recently, State enforcement was lax. However, the political importance of antitrust has made State attorneys general increasingly eager to enforce antitrust measures more rigorously [17]. Invariably, States prefer to take action under federal law as it offers significantly more effective remedies [18].

B)AVENUES FOR ENFORCEMENT

In the US, in addition to the federal court system, two main public authorities - the DOJ and the FTC - share responsibility for antitrust enforcement. These laws may also be enforced in civil action by private parties.

1)Antitrust Division of the Department of Justice (DOJ)[19]

This Division is part of the executive arm of goverment and possesses considerable power and discretion. It is headed by an Assistant Attorney General. The Division employs several hundred lawyers and is divided into three main sections :

a)a trial section dealing with particular investigations, grand jury hearings, court cases and enforcement of judgements ;

b)ten field offices covering the US performing the above functions on a regional basis ;

c)specialist offices, including an economic policy office, which analyses market structure and advises on potential problem areas.

THe DOJ is responsible for enforcing the ShA, having sole criminal jurisdiction to prosecute violations under this statute [20]. Under s.4 ShA, it is also under a duty to institute civil proceedings to restrain antitrust infringements [21]. The Department plays a major role in the enforcement of s.7 CA, but only enforces other provisions of the CA where they form part of serious ShA violations.

2)Federal Trade Commission (FTC) [22]

The FTC is essentially an adminstrative agency with quasi-judicial powers. Its structure is somewhat complex comprising of several different layers.

THe Commission itself consists of a President and four additional Commissioners [23]. The Commission plays a dual role, first acting as 'prosecutors' when they take decisions initiating proceedings and later as 'judges' when they decide cases.

Like the DOJ, the Commission is backed by various section devoted to economic analysis and policy planning. The FTC also has an Office of General Counsel which advises it on all legal matters, including those heard by the Commission in its judicial capacity. This Office also reprsents the FTC at appellate level. The Bureau of Competition is the antitrust enforcement section undertaking the investigation, evaluation and litigation of antitrust complaints [24].

The judicial arm of the FTC is entirely independent from the remainder of the authority. It consists of a number of Adminstrative Law Judges (ALJ) who act as initial arbiters of complaints made by the Bureau of Competition [25].

The FTC's role is a wide one covering not only enforcement of antitrust provisions, but also dealing with a broad range of other consumer related issues [26]. The FTC has sole jurisdiction over s.5 FTC Act and overlapping civil jurisdiction of the CA [27]. The FTC has no criminal jurisdiction.

Over the years, the FTC has been subject to considerable criticism in relation to both its enforcement approach and its failure to achieve the goals set for it by Congress. These criticisms wil be explored further in the main body of the research [28].

3)Federal Court Enforcement

The federal court system hears antitrust cases/appeals brought by the above agencies as well as private actions. At the apex of the system is the Supreme Court. Its position and its role in interpreting the Constitution means that the Supreme Court possess significant legal and political influence [29].

However, problems exist. Antitrust's extensive reliance on the federal courts, each with its own set of precedents, has brought criticism of inconsistency. Moreover, concerns have been raised regarding the adequacy of the courts' economic expertise [30]. Whilst Supreme Court rulings do provide some consistency, its review powers are discretionary. Consequently, circuit conflicts may persist for many years before the Court intervenes to resolve matters [31].

4)Enforcement by Individual Action

An increasingly important means of enforcement is the private antitrust suit seeking treble damages or equitable relief [32]. A right of private action lies under both the ShA and the CA, though not the FTC Act [33]. Whilst most private actions are for treble damages, the number of litgants seeking equitable relief is increasing [34]. Problems of proof and quantum are significant [35]. Consequently, many private suits follow on from successful goverment litigation. Federal Rules of Civil Procedure allow considerable

scope for the acquisition of evidence [36]. Courts have also assisted private litigants by allowing them access to grand jury materials [37]. Where several individuals have been harmed, but it is not practical to sue individually, a class action is possible [38].

So, whilst private litigation is complex and expensive, the possibility of treble damages invariably makes litigation worthwhile [39]. Indeed, it has been noted that fear of such actions is a compelling incentive to observe antitrust regulations [40]. Moreover, the number of such litigants is increasing to the point where they now form the central plank of US antitrust enforcement [41]. Whether this increase in private enforcement is to be encouraged is debateable, as evidence suggests that many private actions are not used to redress the balance but to injure and thereby eliminate rival competitors [42].

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1 Background information on this section is derived from : L.Sullivan *Handbook of the Law of Antitrust* West Publishing Co (1977) ; Neale and Goyder *The Antitrust Laws of the USA* (3rd Edn) Cambridge Unv. Press (1980) ; Agnew *Competition Law* Allen and Unwin (1985) ; Whish *Competition Law* Butterworths (1993) ; Hawk and Veltrop 'Dual Antitrust Enforcement in the United States : Postive or Negative Lessons for the European Community' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 21; Baker 'Investigation and Proof of an Antitrust Violation in the United States : A Comparative Look' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 144 ; Hobbs 'Antitrust in the Next Decade - A Role for the FTC' *Antitrust Bulletin* [1986] 451 ; Johnson and Rupert 'An Introduction to US Antitrust Law' *LSG* [1986] 122-115,126 ; Hawk *US, Common Market and International Antitrust : A Comparative Guide* Prentice Hall (1990).

2 An interesting account of the background to, and development of, this statute can be found in Fox 'The Modernisation of Antitrust : A New Equilibrium' *Cornell LR* [1980] 1140 and in L.Sullivan *Law of Antitrust* Appendix B. These issues are also discussed in Neale and Goyder *The Antitrust Laws of the USA* and Johnson and Rupert 'US Antitrust Law'.

3 Section 2 further proscribes the separate offences of monopolisation, attempts to monopolise and conspiracy to monopolise.

4 The scope and meaning of s.1 is discussed further in Chapter 10 under the examination of the enforcement process when the prosecution's use of the substantive law in case construction will be examined.

5 15 USCA ss.1 and 2 (1973) and 15 USCA s.4 (1973) respectively.

6 Some behaviour is also likely to violate the CA. See previous discussion for further information on the provisions of the CA. The overlap is discussed further by Hawk and Veltrop 'Dual Antitrust Enforcement in the United States'.

7 Further comments on this aspect are made in Johnson and Rupert 'US Antitrust Law' at pp 115 ; L.Sullivan *Law of Antitrust* at pp 752-753 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 4-5. See also *FTC v Brown Shoe Co* 384 US 316 (1966) and *FTC v Sperry Huchinson Co* 405 US 233 (1972).

8 The approach and scope of the CA is discussed in much greater detail in L.Sullivan *Law of Antitrust* at pp 431-470 ; Neale and Goyder *The Antitrust Laws of the USA* Chs 7,8 and Johnson and Rupert 'US Antitrust Law'.

9 The full text of the CA is not provided here, however it is reproduced in L.Sullivan *Law of Antitrust* Appendix B.

10 Thus, this section does not apply to sales to a consumer except to the extent that a lower price is justified because of lower costs to the seller.

11 *Moore v Jas Matthews and Co* 550 F.2d 1207, 1214 (9th Circ 1977).

[12] The rule of reason analytical approach is discussed further under the 'Trial' stage of enforcement in Ch10.

[13] The differences of approach and the problems involved are discussed further in Johnson and Rupert 'US Antitrust Law'at pp 112-115 ; L.Sullivan *Law of Antitrust* at pp 432-434 and Agnew *Competition Law* at pp 196-198.

[14] The DOJ plays a major role in the enforcement of s.7 CA relating to mergers, but only enforces the other provisions of the CA where the offences form part of serious ShA violations. Section 11 CA empowers the FTC to enforce ss.2,3,7 and s.8 CA, whilst s.4 permits private parties to launch actions under the CA and ShA. See discussion by Johnson and Rupert 'US Antitrust Law' at p 115.

[15] The FTC Act and CA apply to practices occurring "in commerce" ie in the course of inter-state trade, rather than simply affecting it. This would seem to be a stricter test. See also, *Gulf Oil Corp v Copp Paving Co* 419 US 186 (1974).

[16] This aspect is discussed further in Agnew *Competition Law* at p 200 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 13-14.

[17] In particular, the lax federal enforcement of the Reagan Administration encouraged States to take more action to fill the enforcememt gap. This was done primarily through the National Association of Attorneys General (NAAG) which issued several aggressive policy statements and clashed on several occasions with the DOJ. Axinn and Glick 'Dual Enforcememt of Merger Law in the EEC : Lessons from the Americam Experience' in HAWK (Ed) *Annual Proceedings* Fordam Corp Law Inst (1989) p 550 ; Hawk and Veltrop 'Dual Antitrust Enforcement in the United States' ; Abrams 'Developments in State Antitrust Enforcement' *NYULRev* [1987] 989, all provide interesting discussions of federal versus state enforcement.

[18] This is particularly so since the Hart-Scott-Rodino Antitirust Improvements Act 1976, s.15 of which enables State attorneys general to bring federal treble damages actions on behalf of consumers. However, States cannot enforce federal criminal law.

[19] For background information on this institution, see : L.Sullivan *Law of Antitrust* at pp 751-752 ; Neale and Goyder *The Antitrust Laws of the USA* at pp 373-375 ; Hawk and Veltrop 'Dual Antitrust Enforcement in the United States' ; Baker 'Investigation and Proof of an Antitrust Violation'.

[20] Ss.1, 2 ShA.

[21] S.4 ShA.

[22] for background information on this institution, see : Neale and Goyder *The Antitrust Laws of the USA* at pp 382-383 ; L.Sullivan *Law of Antitrust* at pp 752-754 ; Hobbs 'A Role for the FTC' ; Hawk and Veltrop 'Dual Antitrust Enforcement in the United States'; Baker 'Investigation and Proof of an Antitrust Violation' ; Lingos 'Transparency of Proceedings at the United States Federal Trade Commission' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 203.

[23] To attain some balance and independence the Commissioners serve for staggered seven year terms. No more than three of the five Commissioners may be from the same political party. See discussion in Hobbs 'A Role for the FTC' at 451-456 and Lingos 'Transparency of Proceedings'at pp 204-205.

[24] The Bureau is also responsible for enforcing compliance and developing guides for industries. It operates through eleven field offices supervised from Washington. For further details, see L.Sullivan *Law of Antitrust* at pp 752-754 and Neale and Goyder *The Antitrust Laws of the USA* at pp 382-383.

[25] The Commission takes its decision on the record of the full adversarial trial held before the ALJ. ALJs are common in US administrative agencies and are similar to English judges sitting at first instance without a jury.

[26] See discussion in Hawk and Veltrop 'Dual Antitrust Enforcement in the United States' ; Hobbs 'A Role for the FTC'. In many respects, the FTC is similar to the OFT in the UK. For further on this, see the assessment of UK law in Appendix D infra.

[27] Ss.2. 3. 7 and 8 CA including Robinson-Patman amendments to price discrimination provisions.

[28] The role of the FTC has been evaluated by Hawk *US, Common Market and International Antitrust* and Lingos 'Transparency of Proceedings'. A comprehensive, though partisan, review of the FTC's actions under Chairman Jas. Miller III may be found in Jas. Miller III *The Performance of the FTC 1977-1984, Report to the Sub-Committee on Oversight and Investigations* House Committee on Energy and Commerce (Sept 1984). Hobbs 'A Role for the FTC' at pp 451-453, notes that the FTC arose out of dissatisfaction with the DOJ's enforcement. Congress perceived a need to have a politically independent regulatory agency which would actively and effectively enforce a broad range of antitrust provisions and provide improved guidance for businesses.

[29] The federal court structure and the role of the Supreme Court are discussed in depth in Abraham *The Judicial Process* Oxford Univ. Press (1986) and in Kelly, Harrison and Betz *The American Constitution - Its Origins and Development* W.W.Norton & Co (1983).

[30] This is particularly so in those antitrust cases heard by juries. These problems are assessed further by Fox and L.Sullivan 'Antitrust - Retrospective and Prospective : Where Are We Coming From ? Where Are We Going ?' *NYULRev* [1987a] 936 ; Kingdon 'Economic Argument in Antitrust Cases : An Americam Litigator's Perspective' *ECLR* [1987] 371 and Hawk and Veltrop 'Dual Antitrust Enforcement in the United States'.

[31] The Court uses the certiorari procedure to select for itself those cases which it considers sufficiently important to hear. In practice, it hears less than 10% of cases. On this, see Baker 'Investigation and Proof of an Antitrust Violation'. Lord McKenzie Stuart in 'Problems of the European Community - Transatlantic Parallels' *ICLQ* [1987] 183, draws some interesting comparisons between the ECJ and the US Supreme Court. Hawk and Veltrop in 'Dual Antitrust Enforcement in the United States' at pp 27-28, provide several examples of circuit conflicts resolved by the Supreme Court.

[32] Hawk *US, Common Market and International Antitrust* ; L.WHITE (Ed) *Private Antitrust Litigation* MIT Press (1988) : Neale and Goyder *The Antitrust Laws of the USA* Ch14 ; Baker 'Investigation and Proof of an Antitrust Violation' at pp 159-162 and Collins and Sunshine 'Is Private Enforcement Effective Antitrust Policy ?' in SLOT AND MCDONNNELL (Eds) *Procedure and Enforcement in EC and US Competition Law* Sweet and Maxwell (1993) p 50, all give thorough accounts of private litigation

[33] This right originated under s.7 ShA. It has since been expanded and codified under s.4 CA.

[34] Examples include *Interphoto Corp v Minolta Corp* 417 F.2d 621 (2d Circ 1969) and *Telflex Industries v Brunswick Corp* 410 F.2d 380 (3d Circ 1969).

[35] To sustain a claim, the private litigant must not only demonstrate that an antitrust violation has occurred, but that this breach has damaged him personally by having a direct impact upon his business. Moreover, the effect of this impact must be financially quantifiable. At the base of the claim, must be a significant restraint of trade which both harms competition in general and the plaintiff in particular. Requirements and problems of proof are discussed in Baker 'Investigation and Proof of an Antitrust Violation' at pp 159-162 and Neale and Goyder *The Antitrust Laws of the USA* at pp 425-428.

[36] These provisions are discussed further by Neale and Goyder *The Antitrust Laws of the USA* at pp 421-424.

[37] Although such material is normally secret, plaintiffs have sometimes been allowed access where they have demonstrated special circumstances. Discussed by Neale and Goyder *The Antitrust Laws of the USA* at p 423.

[38] Rule 23 Federal Rules of Civil Procedure 1966. For further discussion of class actions, see L.Sullivan *Law of Antitrust* at pp 777-785 and Benston 'A Comprehensive Analysis of the Determinants of Private Antitrust Litigation with Particular Emphasis on Class Action Suits and the Rule of Joint and Several Damages' in L.WHITE (Ed) *Private Antitrust Litigation* MIT Press (1988) p 31.

[39] There has been recent criticism of treble damages awards and calls for its abolition. See discussion in Baumol and Ordover 'Use of Antitrust to Subvert Competiton' *Jo Law and Economics* [1985] 247 ; Klien 'Strategic Sham Litigation : Economic incentives in the Context of

the Case Law' *Int Rev Law and Econ* [1986] 241 ; Easterbrook 'Detrebling Antitrust Damages' *Jo Law and Economics* [1985] 445.

40 On this, see Neale and Goyder *The Antitrust Laws of the USA* at p 422.

41 In 1970, there were 877 private actions. By 1984, the number had risen to 1,100. Such actions far outnumber US goverment cases which totalled 56 cases and 101 cases in 1970 and 1984 respectively. See L.WHITE (Ed) *Private Antitrust Litigation* Table 1.1. Hawk and Veltrop in 'Dual Antitrust Enforcement in the United States' at p 27, also note that US courts decide ten private cases for every goverment case.

42 See in particular, Baumol and Ordover 'Use of Antitrust to Subvert Competiton' ; Klien 'Strategic Sham Litigation'; Breit and Elzinga 'Private Antitrust Enforcement : The New Learning' *Jo Law and Econo*mics [1985] 405 ; L.WHITE (Ed) *Private Antitrust Litigation* in general. For a contrary view, see Jas. Miller III 'Comments on Baumol and Ordover' *Jo Law and Economics* [1985] 267.

APPENDIX B

TABLES AND STATISTICS

TABLE 1

Case List of Selected Cases

- Horizontal Cartels

Formally Prosecuted Cases

1)PVC Cartel [1990] 4 CMLR 345 (hereafter referred to as *PVC*). Appealed to CFI as *BASF* [1992] 4 CMLR 357 (hereafter referred to as *BASF*). Appealed to ECJ as Case 137/92 *PVC I* [1995] 5 CMLR 8 (hereafter referred to as *PVC I*). Further Commission decision - *PVC II* OJ [1994] L239/14. *PVC II* is currently on appeal;

2)Polypropylene Cartel [1988] 4 CMLR 347. Appealed as *Hercules* [1992] 4 CMLR 84 (hereafter referred to as *Polypropylene* or *Hercules*);

3)Soda Ash Cartel [1991] 4 CMLR 169, [1994] 4 CMLR 454, [1994] 4 CMLR 645 (hereafter referred to as *Soda Ash*). Also related case of *Soda Ash* [1994] 4 CMLR 482. *Soda Ash* is on appeal to CFI as Case T30/91;

4)LdPE Cartel [1990] 4 CMLR 382 (hereafter referred to as *LdPE*). On appeal as Case T165/89 *Dow Chemicals*;

5)Peroxygen Cartel [1985] 1 CMLR 481 (hereafter referred to as *Peroxygen*);

6)Zinc Producers Cartel [1985] 2 CMLR 108 (hereafter referred to as *Zinc Producers*) and interim appeal *AM&S* [1982] ECR 1575 (hereafter referred to as *AM&S*);

7)Woodpulp Cartel [1985] 3 CMLR 474 (hereafter referred to as *Woodpulp*). Appealed as *Woodpulp II* [1993] 4 CMLR 407 (hereafter referred to as *Woodpulp II*);

8)Belgian Roofing Felt Cartel [1991] 4 CMLR 130 (hereafter referred to as *Belgian Roofing Felt*). Appealed as *Belasco* [1991] 4 CMLR 96 (hereafter referred to as *Belasco*);

9)Italian Flat Glass [1990] 4 CMLR 535 (hereafter referred to as *Italian Flat Glass*). Appealed as *SIV* [1992] ECR 1403 (hereafter referred to as *SIV*);

10)Meldoc [1989] 4 CMLR 853 (hereafter referred to as *Meldoc*);

11)Dutch Books Cartel [1984] ECR 19 (hereafter referred to as *VBBB*);

12)Dutch Cigarettes Cartel [1982] 3 CMLR 702 (hereafter referred to as *Dutch Cigarettes*). Appealed as *SSI* [1985] ECR 3831 (hereafter referred to as *SSI*);

13)Rolled Zinc Products [1983] 2 CMLR 285 (hereafter referred to as *Rolled Zinc*). Appealed as *CRAM* [1984] ECR 1679 (hereafter referred to as *CRAM*);

14)Cast Iron and Steel Rolls [1984] 1 CMLR 694 (hereafter referred to as *Cast Iron and Steel*);

15)Benelux Flat Glass [1985] 2 CMLR 694 (hereafter referred to as *Benelux Flat Glass*);

16)GB-INNO-BM v Fedetab [1978] 3 CMLR 524 (hereafter referred to as *Fedetab*). Appealed as *Van Landewyck* [1980] ECR 3125 (hereafter referred to as *Van Landewyck*);

17)French-West African Shipowners' Committees 22nd Report on Competition Policy 1992 at p 98, OJ [1992] L134/1, [1993] 5 CMLR 446 (hereafter referred to as *FWA*). Appealed as *Compagnie Maritime Belge Transports* [1997] 4 CMLR 273 (hereafter referred to as *Compagnie Maritime Belge*);

18)Dutch Builders Cartel [1993] 5 CMLR 135 (hereafter referred to as *Dutch Builders*). On appeal as Case T29/92 *SPO*:

19)ANSEAU [1992] 2 CMLR 193 (hereafter referred to as *ANSEAU*). Appealed as *IAZ Belgium* [1983] ECR 3369 (hereafter referred to as *IAZ*). Also *Re IPTC Belgium* [1984] 2 CMLR 131;

20)Welded Steel Mesh [1991] 4 CMLR 13 (hereafter referred to as *Welded Steel*);

21)Uniform Eurocheques [1985] 3 CMLR 434, *Eurocheque : Helsinki Agreement* OJ [1992] L95/50. Appealed as *Groupment De Bancaires* [1994] ECR 49 (hereafter referred to as *GCB*);

22)SA Cimenteries [1995] 4 CMLR 327 (hereafter referred to as *Cement* or *Cement Cartel*). See also interim appeals *SA Cimenteries* [1993] 4 CMLR 243 ; *SA Cimenteries* [1993] 4 CMLR 259.

Art.85(3) Exemptions/Crisis Cartels

23)Transocean Marine Paint [1967] CMLR D9, [1974] ECR 1063 (hereafter referred to as *Transocean*);

24)National Sulphuric Acid Association Ltd [1980] 3 CMLR 429 (hereafter referred to as *National Sulphuric Acid*);

25)Synthetic Fibres [1985] 1 CMLR 787 (hereafter referred to as *Synthetic Fibres*);

26)BPCL/ICI [1985] 2 CMLR 330 (hereafter referred to as *BPCL/ICI* or *BP/ICI*);

27)Enichem/ICI [1989] 4 CMLR 54 (hereafter referred to as *Enichem/ICI*);

28)Bayer/BP [1989] 4 CMLR 24 (hereafter referred to as *Bayer/BP*);

29)ENI/Montedison [1988] 4 CMLR 444 (hereafter referred to as *ENI/Montedison*);

30)EMC/DSM OJ [1988] C18/3 (hereafter referred to as *EMC/DSM*);

31)Stichting Baksteen [1993] 4 CMLR 385, [1995] 4 CMLR 646 (hereafter referred to as *Stichting Baksteen*);

32)Shell/AZKO !4th Report on Competition Policy 1984 p 85 (hereafter referred to as *Shell/Azko*).

TABLE 2

Case List of Selected Cases

- Vertical Arrangements

Formally Prosecuted Cases

1)Tippex [1989] 4 CMLR 425. Appealed as *Tippex* [1990] ECR II 261 (both hereafter referred to as *Tippex*);

2)John Deere [1985] 2 CMLR 554 (hereafter referred to as *John Deere*);

3)Camera Care v Hasselblad [1982] 2 CMLR 233 (hereafter referred to as *Camera Care*). Appealed as *Hasselblad* [1984] 1 CMLR 559 (hereafter referred to as *Hasselblad*);

4)Sandoz [1989] 4 CMLR 628. Appealed as *Sandoz* [1990] ECR 45 (both hereafter referred to as *Sandoz*);

5)Pioneer [1980] 1 CMLR 457 (hereafter referred to as *Pioneer)*. Appealed as *MDF* [1983] ECR 1825 (hereafter referred to as *MDF*);

6)Bulloch v Distillers [1978] 1 CMLR 400. Appealed as *Distillers* [1980] ECR 2229 (both hereafter referred to as *Distillers*);

7)Viho/Toshiba [1992] 5 CMLR 180. Appealed as *Viho/Toshiba* [1995] 4 CMLR 299 (both hereafter referred to as *Viho*);

8)Newitt v Dunlop/Slazenger [1993] 5 CMLR 352 (hereafter referred to as *Dunlop/Slazenger*). Appealed as *All Weather Sports Benelux* [1995] 4 CMLR 43 (hereafter referred to as *AWS*);

9)Fisher Price/Quaker Oats Ltd - Toyco [1989] 4 CMLR 553 (hereafter referred to as *Fisher Price*);

10)National Panasonic [1983] 1 CMLR 497, interim appeal *National Panasonic* [1980] ECR 2033 (both hereafter referred to as *National Panasonic*;

11)Derek Merson v BL [1984] 3 CMLR 92 (hereafter referred to as *BL*);

12)AEG-Telefunken [1982] 2 CMLR 386. Appealed as *AEG-Telefunken* [1983] ECR 3151 (both hereafter referred to as *AEG*);

13)Ford Werke [1984] 1 CMLR 569. Appealed as *Ford Werke* [1985] ECR 2725 (both hereafter referred to as *Ford*);

14)Vichy OJ [1991] L75/57, interim appeal *Vichy* [1992] ECR 415 (both hereafter referred to as *Vichy*);

15)Ideal Standard [1988] 4 CMLR 627 (hereafter referred to as *Ideal*);

16)Grohe [1988] 4 CMLR 612 (hereafter referred to as *Grohe*).

17) Murat [1984] 1 CMLR 219 (hereafter referred to as *Murat*);

18)IBM [1984] 2 CMLR 342 (hereafter referred to as *IBM*);

19)Villeroy Boch [1988] 4 CMLR 461 (hereafter referred to as *Villeroy Boch*);

20)Kenwood Electronics [1993] 4 CMLR 389 (hereafter referred to as *Kenwood*);

21)Schott Zwiesel Glaswerke [1993] 5 CMLR 85 (hereafter referred to as *SZG*);

22)Alfa Romeo 14th Report on Competition Policy 1984 at p 70 (hereafter referred to as *Alfa)*;

23)Fiat 14th Report on Competition Policy 1984 at p 71 (hereafter referred to as *Fiat)*.

Art.85(3) Exemptions

24) Parfums Givenchy [1993] 5 CMLR 579 (hereafter referred to as *Parfums Givenchy*). On appeal as Case T87/92 *Kruidvat v Commission*;

25)Yves St Laurent [1993] 4 CMLR 120 (hereafter referred to as *Yves St Laurent*). On appeal as Case T19/92 *Societe GALEC v Commission* and Case T99/22 *Groupement d'Achat Edouard Lecler v Commission*;

26)Grundig [1988] 4 CMLR 865, renewed *Grundig* [1995] 4 CMLR 658 (both hereafter referred to as *Grundig*);

27)Ivoclar [1988] 4 CMLR 781 (hereafter referred to as *Ivoclar*);

28)Agence et Messageries de la Presse [1985] 3 CMLR 800, *Agence et Messageries de la Presse* [1987] 3 CMLR 445 (both hereafter referred to as *AMP*);

29)Whisky and Gin [1986] 2 CMLR 664 (hereafter referred to as *Whisky and Gin*);

30)Saba No 2 [1984] 1 CMLR 676 (hereafter referred to as *Saba II*). See also *Metro II* [1986] ECR 3021.

TABLE 3

Investigation Method - Horizontal Cartels

Case Name	Art.14	Art.11
PVC *	Art.14(3)	Art.11(1)** Art.11(5) [2]
Polypropylene *	Art.14(3) Some Art.14(2)	Art.11(nk)**
Soda Ash *	Art.14(3)	Art.11(nk)**
LdPE *	Art.14(3)	Art.11(5)**,[2]
Peroxygen *	Art.14(3)	Art.11(nk)**
Zinc Producers *	Art.14(3)	Art.11(nk)**
Woodpulp *	Art.14(3)	Art.11(nk)**
Belgian Roofing Felt *	Art.14(3)	-
Italian Flat Glass *	Art.14(3) Some Art.14(2)	-
Meldoc *	Art.14(nk)	Art.11(nk)**
VBBB	- (Notification)	Art.11(nk) [1]
Dutch Cigarettes	-	Art.11(nk) [1] (Notification)
Rolled Zinc *	Art.14(3)	-
Cast Iron and Steel	Art.14(3) (In UK,Belgium France and Italy)	Art.11(nk)** (From the Bundeskartellamt)
Welded Steel *	Art.14(3)	Art.11(nk)**
Benelux Flat Glass *	Art.14(3)	-
Fedetab	-	Art.11(nk)**,[1] (Notification)
FWA *	Art.14(3)	Art.11(5)**,[2]
Dutch Builders	Art.14(2)	Art.11(1)**
ANSEAU *	Art.14(3)	Art.11(nk)**
GCB	-	Art.11(nk)** [1] (Notifications x 2)
Cement *	Art.14(3) Art.14(2)	Art.11(nk)**

TABLE 3 (cont)

Notes - Table 3

nk - denotes that it is unclear from the Commission decision which provision of the Article was employed.

* - In 16 cases, Art.14(3) was used as a primary means of investigation. Only in one case - *Dutch Builders* - was Art.14(2) used entirely.

** - In 14 cases, Art.11 was used as a follow-up procedure.

1 - In four cases, *VBBB*, *Dutch Cigarettes*, *Fedetab* and *GCB*, investigation was under Art.11. In the latter three cases, it was unclear from the Commission decision whether Art.14 was also used.

2 - Art.11(5) decisions were issued in *PVC*, *LdPE* and *FWA*.

TABLE 4

Concepts Employed In Horizontal Cartels

Case Name		Concerted Practice	Collective Responsibility	Complex	Single Offence
PVC		*	*		*
Polypropylene	*	*		*	
Soda Ash		*	-		*
LdPE		*	*		*
Peroxygen		*	Undertaking Liability		-
Zinc Producers		*	Parent Liability		*
Woodpulp		*	*		*
Belgian Roofing Felt		*	*		-
Italian Flat Glass		*	Undertaking Identity		*
Meldoc		*	-		*
VBBB		-	-		-
Dutch Cigarettes		*	-		-
Rolled Zinc		*	-		-
Cast Iron and Steel		*	Parent Liability		*
Welded Steel		*	*		*
Benelux Flat Glass		*	Parent Liability		-
Fedetab		*	-		*
FWA		*	*		-
Dutch Builders		*	-		*
ANSEAU		-	*		-
GCB		-	*		-
Cement		*	*		*
Total		19	10		13

* - denotes the existence of the relevant concept.

TABLE 5

Sanctions - Horizontal Cartels

Case Name	Type of Decision	Duration of Offence	Total Fine in ECU
PVC (1990)*	CD/L	4yrs	23.5m [1]
Polypropylene (1988)	CD/L	6yrs	57.85m [2]
Soda Ash (1991)*	CD/L	17yrs	18m
LdPE (1990)*	CD/L	7yrs	37m
Peroxygen (1985)	CD/L	10-20 yrs	9m
Zinc Producers (1985)	CD**	13yrs	3.3m
Woodpulp (1985)	CD/L	7yrs	4.125m [3]
Belgian Roofing Felt (1991)	CD/L	6yrs	1m
Italian Flat *Glass* (1990)	CD/L	3-5yrs	13.4m [4]
Meldoc (1989)	CD	6yrs	6.5m
VBBB (1984)	CD	-	-
Dutch Cigarettes (1982)	CD/L	3-5 months	1.475m [5]
Rolled Zinc (1982)	CD/L	3yrs	900,000 [6]
Cast Iron and Steel (1984)	CD	12yrs	1.25m
Welded Steel (1991)	CD/L	5yrs	9.5m
Benelux Flat Glass (1985)	CD**	4yrs	4m
Fedetab (1978)	CD/L	-	-
FWA (1992)	CD/L	5yrs	15.3m
*Dutch Builders** (1993)	CD/L	12yrs	22.5m
ANSEAU (1982)	CD/L	3yrs	944,000
GCB (1992)	CD**	6yrs	6m [8]
Cement (1995)	CD/L	11yrs	248m

TABLE 5 (cont)

Notes - Table 5

* - Case currently on appeal.

** - Decision of declaratory value only.

CD - Cease and desist order.

CD/L - Cease and desist/like effect order.

1 - *PVC* fine quashed by the ECJ. The Commission decision in *PVC II* imposed a fine of 19.25m ECU.

2 - *Polypropylene* fine reduced on appeal to 54.5m ECU.

3 - *Woodpulp* fine reduced on appeal to 130.000 ECU.

4 - *Italian Flat Glass* fine reduced on appeal to 1.6m ECU.

5 - *Dutch Cigarettes* fine reduced on appeal to 1.425m ECU.

6 - *Rolled Zinc* fine cancelled on appeal.

7 - *FWA* fine reduced on appeal to 9,090,000m ECU.

8 - *GCB* fine reduced on appeal to 2m ECU.

TABLE 6

Investigation Method - Vertical Arrangements

Case Name	Art.14	Art.11	Other
Tippex	Art.14(nk)	Art.11(nk)**	-
John Deere	Art.14(nk)	Art.11(nk)**	-
*Camera Care**	Art.14(3)	-	-
Sandoz	Art.14(nk)	Art.11(nk) [1]	-
Pioneer/MDF	Art.14(nk)	-	-
Distillers	-	Art.11(nk) (Notification)	-
Viho	Art.14(nk)	Art.11(nk)**	-
Dunlop/ Slazenger	Art.14(nk)	Art.11(nk)**	-
Fisher Price	Art.14(nk)	-	-
*National Panasonic**	Art.14(3)	-	-
BL	Art.14(nk)	-	-
AEG	Art.14(nk)	Art.11(nk)**	-
Ford [3]	-	- Notification	
Vichy [3]	-	-	Notification
Ideal [3]	-	-	Notification
Grohe [3]	- -	Notification	

Notes - Table 6

nk - Denotes that it is unclear from the Commission decision which provision of the Article was used.

* - In only two cases, *Camera Care* and *National Panasonic*, was Art.14(3) clearly used. In nine other cases, it is unclear from the report which provision of Art.14 was employed.

** - Denotes that Art.11 was used as a follow-up procedure. This occurred in five cases.

[1] - In *Sandoz*, Art.11 was used prior to Art.14.

[2] - *Distillers* was the only case which used Art.11 as a primary means of investigation.

[3] - In *Ford*, *Vichy*, *Ideal* and *Grohe* information was obtained primarily from notification of the arrangement.

TABLE 7

Sanctions - Vertical Arrangements

Case Name	Type of Decision	Duration of Offence	Total Fine in ECU
Tippex (1989)	CD/L	4yrs	410,000
John Deere (1985)	CD/L	7yrs	2m
Camera Care (1982)	CD/L	6yrs	755,000 [1]
Sandoz (1989)	CD/L	22yrs	800,000 [2]
Pioneer/MDF (1983)	CD/L	3 months - 2yrs	6.95m [3]
Viho (1992)	CD	14yrs	2m
Dunlop/ Slazenger (1993)	CD	7-13yrs	5.15m [4]
Fisher Price (1989)	CD	3yrs	300,000
National Panasonic (1982)	CD	3yrs	450,000
BL (1984)	CD	3yrs	350,000
AEG (1983)	CD	3.5yrs	1m
Distillers (1980)	CD	-	-
Ford (1984)	CD/L	-	-
Vichy (1991)	N/A [5]	-	-
Ideal (1988)	CD	-	-
Grohe (1988)	CD	-	-

Notes - Table 7

CD - Cease and desist order.

CD/L - Cease and desist/like effect order.

[1] - *Camera Care* fine reduced on appeal to 670,000 ECU.

[2] - *Sandoz* fine reduced on appeal to 500,000 ECU.

[3] - *MDF* fine reduced on appeal to 3.2m ECU.

TABLE 7 (cont)

Notes - Table 7 (cont)

[4] - On appeal, the fine on *AWS* was cancelled. Total fine imposed in *Dunlop/Slazenger* 5m ECU.

[5] - Not applicable. Final decision in *Vichy* is still awaited.

TABLE 8

Statistics - Commission Decisions *

	1980	1981	1982	1983	1984
Substantive Decisions	9	11	9	15	20
Procedural Decisions	-	10	4	2	-
Comfort Letters [1]	-	-	-	-	(3)
Informal Resolutions	183	121	479	343	211
Cases Pending	4,203	4,365	4,199	4,138	4,194

TABLE 8 (cont)

	1985	1986	1987	1988	1989
Substantive Decisions	15	21	16	25	15
Procedural Decisions	1 [2]	-	42 [3]	-	-
Comfort Letters [1]	(2)	74	57	36	46(3)
Informal Resolutions	1,185[4]	283	334	419	382
Cases Pending	3,313	3,522	3,427	3,451	3,239

TABLE 8 (cont)

	1990	1991	1992	1993	1994
Substantive Decisions	15	13	20	12	33
Procedural Decisions	-	1	-	2	6
Comfort Letters [1]	158(3)	146(5)	176(8)	180(3)	197(2)
Informal Resolutions	710	676	553	734	525
Cases Pending	2,734	2,287	1,562	1,231	1,058

TABLE 8 (cont)

Notes - Table 8

* - Data derived from Commission Annual Reports on Competition Policy.

1 - The number of formal comfort letters included in the total is given in brackets.

2 - This decision was issued under Art.11.

3 - In 1987, 31 of these decisions were issued under Art.11(5), whilst 11 were made under Art.14(3).

4 - In 1985, 1,043 of these resolutions were notifications.

APPENDIX C

THE CONCEPT OF COMPETITION

"A lawyer who has not studied economics....is very apt to become a public enemy." [1]

A)INTRODUCTION

The principles of the free market dominate most Western economies and central to the free market system is the concept of competition. An understanding of the law relating to competition is virtually impossible without some appreciation of the economic theories and principles which support the legal regulation. Thus, it is intended within this appendix to place competition law within its economic context, providing an overview of the central theories and concepts relating to competition. In particular the meaning and functions of competition will be examined.

A very basic definition of competition involves a contentious striving for superiority which, in commercial terms, can be seen as a struggle for custom and business in the market-place. Similarly, the primary objective of competition policy may be defined as the promotion of effective, rivalrous competition under conditions of uncertainty whilst preventing abuse of market power and thereby protecting consumers. However, further scrutiny reveals that, beneath these simple definitions, the meaning and functions of competition and competition law are the subject of a highly complicated and often confusing economic debate. Thus, it is important from the outset to recognise the problematic nature of the economics surrounding competition law and realise that a study of this area invariably raises more questions than it answers. Economists themselves cannot agree and often interpret the same facts differently resulting in diverging policy recommendations. Similarly, different economic theories attribute competition law with different aims. Moreover, many of these established theortical frameworks do not readily translate into practical competition policies. The notion that competition law has been ascribed many different and frequently conflicting economic, political and social goals and the ensuing problems are themes that have been discussed in the course of this research. However, to reduce this subject to comprehensible terms some of the more important, recurring concepts and aims of competition will be highlighted here [2].

The next two sections will broadly question what antitrust rules are all about. This discussion of the objectives of competition will be considered under its economic and non-economic aims.

B)ECONOMIC AIMS AND OBJECTIVES OF COMPETITION LAW [3]

In order to discover what, in economic terms, competition rules seek to achieve, some of the main economic theories will be examined to discover what aims they ascribe to competition and the type of competition policy normally associated with that particular economic theory. All economies however organised must decide how resources, in terms of goods and services, are to be allocated. Economists have identified two chief aims of resource allocation ; efficiency and equity. It is this notion of efficiency which dominates the economic aims of competition law. Efficiency may simply be defined as achieving maximum output from the resources available to the economy, but as will be demonstrated, each economic approach defines efficiency differently

which in turn affects its role within competition policy and the overall application of that policy in the real world. It seems that economists have little to contribute regarding the concept of equity. Indeed, whether any competition policy can achieve such an objective is controversial and has been examined in Chapter One [4].

The chief economic forces shaping competition law must now be considered. One of the most influential economic theories ever postulated was that of Adam Smith's [5], who suggested that the forces of competition, the "Invisible Hand", could bring about the reconciliation of individual, uncoordinated, self-interested behaviour with the general social good. This argument still possesses tremendous force and is the basis of modern mainstream economics [6].

1)Neo-Classical Economics

This mainstream school of economic thought has spawned several different versions, each influencing the objectives of competition in different ways. Some of these variations will be dealt with below [7].

a)The Orthodox Approach

In essence, this approach is the basic law of supply and demand. Here the goal is the maximisation of consumer welfare [8]. This is done under conditions of perfect competition [9]. Given such conditions, allocative efficiency results. This is an ideal state in which all resources in all markets are allocated to their first-best use in view of consumers' wants and willingness to pay the price. Here, the fewest resources are used to produce the goods and satisfy consumers' demands. This is termed productive efficiency The economically efficient or optimal level of output is reached when the marginal cost [10] is equal to the price that consumers are willing to pay and so the system achieves equilibrium. Thus, the aggregate effect of allocative and productive efficiency is the maximisation of society's wealth. In sum, this modern version of Smith's "Invisible Hand" measures efficiency in terms of consumer welfare which is maximised through output decisions constrained by competitive pressures which push prices down to marginal cost and produce efficient levels of output. Further advantages flow from perfect competition. In the long-term, the mechanism of free market entry ensures the elimination of any excess profits and encourages producers to research and innovate. As can be seen, the concept of competition under this model is limited ; rivalry as such does not exist as each firm faces the market rather than identifiable rivals [11].

The situation under monopoly conditions is very different. The monopolist is responsible for total output and, through the mechanism of supply and demand, he is in a position to affect market price. Moreover, the absence of competition gives him no incentive to minimise his costs. The result is allocative and productive inefficiency, the taking of supra-competitive profits and an overall loss to society sometimes known as the "welfare cost of monopoly" [12].

However, orthodox economics suffers from fundamental limitations. The most important criticism is that perfect competition is unrealistic and unattainable as perfect competition and pure monopoly rarely occur. Furthermore, it assumes that all businessmen act rationally and aim to maximise profits. But, this is not necessarily so. Moreover, because it is based on a static model of behaviour, this theory fails to take account of the dynamic nature of markets. Finally, the 'Second Best' theory argues that given that perfect competition is unattainable, to aim for a second best solution, that is the best position actually achievable, could well be extremely dangerous as it

may exacerbate allocative inefficiency and harm consumer welfare. In terms of competition law, the implication is that by dealing with a market failure in one sector of the economy, the goverment may create another elsewhere. As well as possessing thoeretical limitations, orthodox economics produces an equally limited competition policy. Here the only goal of competition law is to improve allocative efficiency and thereby enhance consumer welfare. Thus, proponents argue that antitrust should govern only conduct which artifically lowers and thus impairs consumer welfare. So, competition law would challenge only inefficient conduct and inefficiency would be measured by that firm's power to restrict output. Consequently, antitrust policy would probably be aimed at monopolies, oligopolies cartels and possibly mergers. However, the restrictive definition many neo-classical economists place on a producer's ability to control and limit his output means that very few acts would actually be challenged under this theory [13].

b) The Chicago School

In recent decades, this formidable variation of neo-classical theory has dominated economic analysis, particularly in the US, and has generated considerable literature and heated debate. Chicago economists have challenged many dearly held tenets of competition law, and in particular, have swept aside as irrelevant, and indeed positively harmful, the socio-political values which have informed so much of antitrust thinking this century. Similarly, they have de-emphasised traditional problems relating to market structures, concentrations, vertical integration and exclusive dealing. As Fox [14], succinctly remarks, the main gap between Chicago and its critics is its social and political philosophy [15].

For Chicago economists, the exclusive goal is allocative efficiency thereby enhancing consumer welfare and maximising the nation's wealth. However, Chicago does not use consumer welfare in the orthodox sense but instead argues that what is good for big business is good for the consumer. Thus, the Chicago solution is to give maximum autonomy to private business. Chicagoists argue that to inhibit the promotion of efficiency in order to assist rivals imposes a tax on efficiency for the purpose of subsidising the inept. Consequently, Chicago analysis first examines a firm's cost/price ratio to determine whether it possesses market power with a high differential indicating such power. Where market power exists, whether such power is temporary or enduring is then assessed. Only where market power persists does intervention occur. However, Chicago is largely sceptical of market power believing it to be invariably temporary. This chiefly arises from their belief that generally entry barriers [16] are low and that all firms possess perfect information on the costs and benefits of entering a market. Thus, in such a situation, the threat of new competition will operate to discipline incumbent firms and prevent them from misusing their power. So for Chicagoists, the market is self-correcting [17].

Clearly this restrictive approach leaves only a minimal role for antitrust. Translated into actual competition policy, the approach would be extremely non-interventionist and only in instances of traditional price-fixing or market sharing cartels and some large horizontal mergers would inervention be required. Competition authorities would also be concerned with any other artificial entry barriers which were not forms of superior efficiency and which prevented the market mechanism from eroding those market positions not based on superior efficiency [18].

There has been considerable criticism of Chicago. On economic grounds, it has been criticised as unduly assuming that everyone possesses perfect information and as being too static and therefore underestimating the dynamic aspects of many business

practices. The political basis has also been challenged. Fox [19], in particular, criticises the view that efficiency has been, or ever should be, the sole aim of antitrust and considers that such economic arguments mask political value judgements. She asserts that choosing efficiency as the fulcrum of the Chicsgo paradigm and giving it a narrow definition reflects a political philosophy which wishes to ensure that antitrust enforcement is sidelined on the basis that a non-interventionist approach is cheap, predictable and secures considerable autonomy for big business. As a result of this criticism, there is, in the USA, a growing reaction against Chicago labelled the 'nouvelle vague' which embraces many traditional values whilst attempting to develop more dynamic theories on strategic behaviour and predation. However, the extent of its influence on antitrust and its ability to sweep aside Chicago economics are, as yet, unknown [20].

2)The Structure-Conduct-Performance Approach/The Harvard School

The deficiencies of orthodox theory have encouraged other approaches to economic analysis. The structure-conduct-performance approach, first outlined by Mason in 1937, argues that there is a direct causal link between the structure of an industry, its conduct and the quality of its economic performance. Harvard's main argument is that profitability is positively related to the level of seller concentration, the height of entry barriers, the extent of product differentiation and the rate of the growth of demand. Harvard economists use complicated statistics to measure the relationship between these concepts and thereby attempt to identify those structural factors which lead to unacceptable behaviour and those which promote satisfactory performance [21].

A competition policy based on this approach would operate with the above economic concepts in mind, and where industry structure was wrong, intervention would be necessary to deconcentrate the market. Where conduct was at fault, intervention would probably take the form of requiring the registration of restrictive practices [22].

However, whilst several studies do demonstrate a positive link between concentration and profit levels, this economic paradigm suffers from several deficiencies. The Chicago school has criticised Harvard at every stage. Chicagoists argue that market structure alone cannot be used to indicate market power and comment that if a certain structure is an historically inherent product of the market mechanism, then deconcentration will be futile, as in time, the market will restore the structure. Chicago economists are equally critical of the conduct aspect, believing that little scope exists for intervention to control restrictive practices. Finally, market performance, usually measured by accounting profits, yields only obscure, vague and often conflicting information and therefore fails to provide a secure basis for intervention. The statistical methods used have been criticised by many as being indirect and circumstantial and thus failing to explain directly the strength of competition in a market. Such measurements fail to say anything conclusive about the competitive process itself giving no indication of how hard firms are competing and whether the competition is aggressive or passive. Moreover, many feel this approach defective as it is uni-directional and takes no account of the way in which performance may impact on structure and conduct. Another fundamental objection is the ambiguity, and consequently problematic interpretation, of these statistical measurements. Demetz [23] in particular, has demonstrated that the same factual relationship between concentration and profits could arise from an entirely different, and indeed beneficial mechanism, reflecting satisfactory market operation. Unfortunately, thus far, no conclusive test has been developed enabling economists to

ascertain the true situation. So whilst this approach may have clarified some of the issues involved, it does not at present appear to afford a reliable foundation for competition policy [24].

3)Workable Competition

Another response to the inadequacies of mainstream economics has been the theory of 'workable competition' which accepts that perfect competition is unattainable and instead aims to achieve the best competitive arrangement practically possible. It is argued that a workably competitive market structure will produce beneficial effects in terms of conduct and performance. A competition policy based on this concept would seek to maintain a workably competitive enviroment by controlling abuse of market position by dominant firms, monitoring mergers which concentrate markets and preventing firms entering restrictive agreements which possess no beneficial effects [25].

However, this approach is limited. Economic analysis has failed to formulate suitable criteria for workable competition and thus this concept has been criticised as vague and unworkable. Moreover, many structural and behavioural norms that have been identified as requisite elements of a workably competitive industry are approximations of perfect competition and are therefore subject to crticism under the 'Second Best' theory [26].

4)Contestability

The theory of 'contestable markets' provides a radical departure from traditional approaches. The details of the theory are complex. Thus, only the key elements will be discussed here [27]. The central feature of contestability is that a market should be vulnerable to competitive forces even when occupied by a monopolist/oligopolist so that potential entry or competition *for* the market will discipline behaviour as efficiently as actual competition *within* the market and thus ensure an optimal allocation of resources. In order to achieve this type of control, contestability focuses on two main concepts : entry barriers and sunk costs. In a perfectly contestable market, entry to the market must be possible and profitable. Indeed, both entry and exit should free and easy, thus allowing incumbents and new entrants to compete on equal terms and enabling firms to exit an industry without loss when profitable opportunites disappear. This theory believes that often many entry barriers are less problematic than is usually believed and that the real major deterrent to entry is sunk costs. These are non-recoverable costs which cannot be eliminated even by the cessation of prodution. Clearly, where sunk costs are low, entry to the market is easy and the threat of potential competition increases commensurately thereby disciplining the incumbent firms and encouraging economic effiency. Clearly then, contestability provides a new benchmark to the unattainable standard of perfect competition. A perfectly contestable market need not be a perfectly competitive one. Consequently, this theory is more readily applicable to the real world. Furthermore, contestability alters the focus of competition policy. Intervention is not necessarily directed at the market itself but at market parameters. So providing a market is contestable, previous contra-indications of effective competition are irrelevant and intervention is not required. Only where markets are not contestable is goverment intervention necessary. This would take the form of ensuring low entry barriers and the reduction of sunk costs. This could be achieved by having sunk costs borne by the goverment or by leased or shared use of these cost committments. Plainly, contestability's radically different focus has major implications for the concept of competition and the form and

functions of competition law and policy. However, as this approach is a relatively new one, it is unclear how significant the theory will be in the formulation of modern competition policy [28].

5)The Austrian Approach

The Austrian approach which has found favour with recent Conservative goverments in the UK, argues that capitalist economies must be viewed in dynamic terms. Here competition is seen as a process where markets are in disequilibrium, where no-one possesses perfect information and different firms have differing abilities. A central concept is the entrepreneur who employs creativity and foresight to earn profits and thus provides the driving force of the capitalist system [29].

A competition policy based on this approach would be essentially non-interventionist : direct intervention is regarded as highly damaging. A fundamental aim of antitrust policy would be to secure the free functioning of the market which is seen as vital to long-term growth and prosperity. Thus, competition law would seek to promote entrepreneurship by encouraging initiative and enterprise and ensuring that markets are allowed to transmit the right signals in terms of reward and opportunity. As profits are seen here as reward for initiative, all policies to eliminate excess profits would be eschewed. So, in general, no action would be taken against monopolies or restrictive practices [30].

C)NON-ECONOMIC AIMS AND OBJECTIVES OF COMPETITION LAW

A traditional approach to the concept of competition is the populist view influential in the US for many decades. This view rests on a distrust of corporate power which is considered a threat to democracy, individual freedom of choice and economic opportunity. Big business is seen as being responsible for many of society's problems ; enviromental destruction, the hindering of technical progress, the extraction of supra-competitive profits at the consumer's expense and the extinction of small businesses. In the US, these beliefs led to an aggressive, interventionist competition policy aimed at the promotion of economic equity rather than economic efficiency, central themes being the dispersal of power and the redistribution of wealth, and the protection of consumers from abuse and small firms against powerful rivals [31].

Competition law has been assigned other social and political functions. For instance, it may be used to pursue policies on such issues as regional development and unempolyment. A particularly important function of competition law is as a political tool used by goverments of all political philosophies. Currently, it is being employed by the EC to achieve single market integration. It is also used by big business as a political strategy to maximise autonomy and eradicate competition by injuring rivals [32].

1)Competition as a Process

Many of the above themes are unified in the traditional notion of competition as a process. This approach was castigated and discarded by the Chicago economists, but is now being reaffirmed as part of the current reaction against the Chicago paradigm. The notion of competition as an ongoing, strategic process views competition law as dynamic and fluid and embodying many political, economic and social functions. The overall aim of this approach is to create an enviroment conducive to rivalrous

competition, thus producing competitive pressures of varying types and degrees. The resulting competitive struggle will ensure that firms operate efficiently in order to survive and will offer consumers considerable protection from exploitation. This approach perceives markets as inherently imperfect and in constant disequilibrium and new entrants to the markets as vital sources of energy and progress [33]. Competition policy based on this approach would seek to promote competition by keeping markets fluid and open, encouraging diversity, maintaining low entry barriers and providing greater opportunities for entry. This process places consumer interests as central, but also seeks to integrate other non-economic and economic goals, according economic analysis and the notion of efficiency subordinate roles by using them to achieve open markets, the dispersal of power and the freedom to compete on the merits [34].

D)CONCLUSION

It can be seen fom this brief examination that the central economic aim of antitrust is the promotion of efficiency. However, beyond this there is no consensus with different economic theories defining efficiency differently. Indeed, there is little agreement on even the basic concept of competition or which forms of market behaviour are anti-competitive and how best to tackle these problems. Moreover, inherent difficulties exist in measuring whether the right amount and type of competition has been achieved. Furthermore, the role of non-economic values within antitrust is unclear and particularly contentious. Numerous, often conflicting, objectives are ascribed to competition law with no agreement on which of these non-economic factors should be validly considered or their relative weight within the decision-making process. Although, this conflict within competition law may not be so much about striving towards a particular goal as who makes the important economic decisions This in itself raises problems. If there is any consensus to be gleaned from the above economic approaches in terms of competition policy, it would seem to be that direct intervention is believed to be less effective than relying on market mechanisms. The general belief is that competition is best promoted by seeking to ensure that the dynamics and discipline of the market mechanism are permitted to work unimpeded. This is achieved by focusing on market parameters thus ensuring that the market is disciplined by an absence of entry barriers [35].

Most importantly it must be recognised that competition is an elusive, multi-faceted concept which raises many complex issues to which there seem to be no clear answers. The definition and objectives of competition seem almost infinite. Arguments persist regarding the concept and role of efficiency and the inclusion of non-economic values in the equation. Moreover, the difficulties and conflicts involved in formulating an effective means of regulation raise doubts as to the justiciability of competition issues [36]. Yet, competition is so fundamental to the successful working of so many economies that it is vitally important that this concept and how it is applied in practice are fully understood. In conclusion, McNulty [37], eloquently summarises the findings of this appendix :

> "...there is probably no concept in all of economics that is at once more fundamental and pervasive, yet less satisfactorily developed than the concept of competition. "

1 Judge Brandeis 1916.

2 Whish *Competition Law* Butterworths (1993) at p 1 ; Agnew *Competition Law* Allen and Unwin (1985) at pp 17-19 ; de Jong 'EEC Competition Policy towards Restrictive Practices' in GEORGE and JOLL (Eds) *Competition Policy in the UK and EEC* Cambridge Unv. Press (1975) at p 58 ; Heath 'Commment on H.W. de Jong' in GEORGE and JOLL (Eds) *Competition Policy in the UK and EEC* Cambridge Unv. Press (1975) at pp 61-62 ; Hay 'Competition Policy' *Ox Rev Ec P* [1986] 1 at p 3.

3 For a more in depth discussion, see: Scherer and Ross *Industrial Market Structure and Economic Performance* (3rd Edn) Rand McNally (1991) Chs 1, 2 ; Swann *Competition and Consumer Protection* London (1979) Ch3 ; Asch *Industrial Organisation and Antitrust Policy* (1983) John Wiley and Sons Ch1.

4 See the general discussion of justiciability of cpmpetition issues in Ch1 supra. See also, Korah *Introductory Guide to EEC Competition Law and Practice* ESC Publishing (1986a) at p 6 ; Whish *Competition Law* at pp 1-3 ; Fox 'The Modernisation of Antitrust : A New Equilibrium' *Cornell LR* [1980] 1140 at pp 1140-1142 ; Agnew *Competition Law* at pp 19-24.

5 A.Smith *An Enquiry into the Nature and Causes of the Wealth of Nations* Modern Library Edition (1776) New York.

6 Liesner and Glynn 'Does Antitrust Make Economic Sense' *ECLR* [1987] 344 at pp 344-345 ; Agnew *Competition Law* at p 25.

7 See note 2 supra for literature on this subject.

8 Consumer welfare is used here in a technical sense and does not necessarily reflect general notions of consumer welfare.

9 For precise details of the conditions of perfect competition, see Agnew *Competition Law* at pp 25-26.

10 This is the cost of producing an additional unit of output. Here marginal cost would include a reasonable profit margin.

11 See Fox 'The Modernisation of Antitrust' at pp 1159-1163 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 348-349 ; Thompson 'Competition as a Strategic Process' *Antitrust Bulletin* [1980] 777 at pp 777-779 ; Whish *Competition Law* at pp 4-5.

12 Liesner and Glynn 'Does Antitrust Make Economic Sense' at p 349 ; Whish *Competition Law* at pp 5-6 ; Agnew *Competition Law* at pp 28-33.

13 Fox 'The Modernisation of Antitrust' at pp 1158-1165 ; Whish *Competition Law* at pp 4-9 ; Thompson 'Competition as a Strategic Process' at pp 777-780 ; Asch *Industrial Organisation and Antitrust Policy* at pp 97-100 ; Agnew *Competition Law* at pp 24-32 ; Lipsey and Lancaster 'The General Theory of Second Best' *Review of Economic Studies* [1956/1957] 10 at pp 11-32 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 348-350.

14 Fox 'Consumer Beware Chicago' *Mich LR* [1986a] 1714.

15 Posner *Antitrust Law* Millstien (1976) ; Bork *The Antitrust Paradox : A Policy at War with Itself* (1978) ; Korah 'EEC Competition Policy - Legal Form or Economic Efficiency' *CLP* [1986b] 85 at p 85 ; Hawk 'The American Antitrust Revolution : Lessons For The EEC ?' *ECLR* [1988] 53 at p 59.

16 These may be simply defined as obstacles to the entry of a new firm to the market.

17 See Bork *The Antitrust Paradox* ; Posner 'The Chicago School of Antitrust' *Un Penn LR* [1979] 925 ; Hawk 'The American Antitrust Revolution' at pp 58-59 ; Green, Hartley and Usher *The Legal Foundations of the Single Market* Oxford Unv. Press (1991) at pp 204-205 ; Easterbrook 'The Limits of Antitrust' *Texas LR* [1984a] 1 ; Bork and Bowman 'The Crisis in Antitrust' *Columbia LR* [1965] 363 at pp 363-369 ; L.Sullivan 'Book Review' *Columbia LR* [1974] 214.

18 Hawk 'The American Antitrust Revolution' at p 60 ; Green, Hartley and Usher *The Legal Foundations of the Single Market* at p 205 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 355-356 ; Fox 'The Modernisation of Antitrust' at p 1145.

19 Fox 'The New American Competition Policy - From Antitrust To Pro-Efficiency' *ECLR* [1981] 439.

20 Fox 'The New American Competition Policy' at pp 439-445 ; Fox 'The Modernisation of Antitrust' at pp 1154-1155, 1157, 1176-1179 ; Korah *Introductory Guide* (1986a) at pp 86, 89 ; Pitofsky 'The Political Content of Antitrust' *Un Penn LR* [1978-79] 1051 at pp 1051-1052 ; Schwartz 'Justice and Other Non-Economic Goals of Antitrust' *Un Penn LR* [1978-79] 1076 at pp 1076-1079 ; Kingdon 'Economic Argument in Antitrust : An American Litigator's Perspective' *ECLR* [1987] 371 at p 372 ; Flynn 'Introduction to Antitrust Jurisprudence : A Symposium on the Economic, Political and Social Goals of Antitrust Policy' *Un Penn LR* [1977] 1182.

21 Mason 'Monopoly in Law and Economics' *Yale LJ* [1937] 49 ; Agnew *Competition Law* at pp 35-37 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 355-356.

22 Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 355.

23 See Demetz 'Industry Structure, Market Rivalry and Public Policy' *Jo Law and Economics* [1973] 1 at pp 1-10 ; Demetz 'Two Systems of Belief about Monopoly' in GOLDSCHMID (Ed) *Industrial Concentration : The New Learning* Boston Little Brown (1974) at p 1.

24 Thompson 'Competition as a Strategic Process' at pp 781-784 ; Phillips 'A Critique of Empirical Studies of Relations Between Market Structure and Profitability' *Jo of Industrial Economics* [1976] 241 at pp 241-249 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 357-358 ; Demetz 'Industry Structure, Market Rivalry and Public Policy' at pp 1-10 ; Demetz 'Two Systems of Belief about Monopoly' at pp 164-184 ; R.Clarke, Davies and Waterson 'The Profitability-Concentration Relation : Market Power or Efficiency?' *Jo of Industrial Economics* [1984] 435 at pp 435-450.

25 J.M.Clarke 'Toward A Concept of Workable Competition' *Am Ec Rev* [1940] 241 at pp 241-256 ; Asch *Industrial Organisation and Antitrust Policy* at pp 100-104 ; Agnew *Competition Law* at pp 33-34 ; Whish *Competition Law* at pp 14-15.

26 Scherer and Ross *Industrial Market Structure and Economic Performance* at pp 41-43 ; Sosnick 'A Critique of Concepts of Workable Competition' *Q Jo Econ* [1958] 380 at pp 380-423 ; Stigler 'Report on Antitrust Policy Discussion' *Am Ec Rev* [1956] 505 at p 505 ; Lee 'Performance Measurement' in DEVINE, LEE, JONES and THOMPSON (Eds) *An Introduction to Industrial Economics* Allen and Unwin (1979) p 300 at pp 300-327.

27 For more detailed discussion of the theory of contestability, see Baumol, Panzar and Willig *Contestable Markets and the Theory of Industry Structure* Harcourt Brace Jovanovich (1982) ;Bailey 'Contestability and the Design of Regulatory and Antitrust Policy' *Am Ec Rev* [1981] 178.

28 Bailey 'Contestability' at pp 178-183 ; Baumol, Panzar and Willig *Contestable Markets* ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 351-352 ; Demetz 'Why Regulate Utilities' *Jo Law and Economics* [1968] 55 at pp 55-65 ; Faulhaber 'Cross-Subsidisation: Pricing in Public Enterprise' *Am Ec Rev* [1975] 966 at pp 966-977.

29 See Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 361-362 ; Agnew *Competition Law* at pp 38-39 ; Demetz 'Information and Efficiency : Another Viewpoint' *Jo Law and Economics* [1969] 1 at pp 1-12 ; Littlechild 'Misleading Calculations of the Social Costs of Monopoly Power' *Econ Jo* [1981] 348 at pp 348-363 ; Reekie *Industry Prices and Markets* Philip Allan (1979).

30 Agnew *Competition Law* at p 39 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 363-364.

31 Fox 'The Modernisation of Antitrust' at pp 1142-1143, 1152-1154 ; Whish *Competition Law* at pp 1-20 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 345-346.

32 For further, see Green, Hartley and Usher *The Legal Foundations of the Single Market* at pp 198-199 ; Fox 'The Modernisation of Antitrust' at pp 1155-1156, 1167-1168, 1170-1172 ; Bork

and Bowman 'The Crisis in Antitrust' at pp 364-365 ; Baumol and Ordover 'Use of Antitrust to Subvert Competition' *Jo Law and Economics* [1985] 247.

33 On this, see Thompson 'Competition as a Strategic Process' at pp 779, 786, 790 ; Fox 'The Modernisation of Antitrust' at pp 1154, 1169, 1173, 1179-1183 ; McNulty 'A Note on the History of Perfect Competition' *Jo of Political Economy* [1967] 173 at pp 173-183.

34 Fox 'The Modernisation of Antitrust' at pp 1179-1183 ; Thompson 'Competition as a Strategic Process' at pp 785-786, 789-796.

35 Korah *Competition Law in Britain and the Common Market* Martinus Nijhoff (1982a) at pp 283-284 ; Whish *Competition Law* at pp 12-16 ; Liesner and Glynn 'Does Antitrust Make Economic Sense' at pp 358, 360, 364.

36 For further on justiciability, see the earlier discussion in Ch1 supra.

37 McNulty 'Economic Theory and the Meaning of Competition' *Q Jo Econ* [1968] 639 at p 639.

APPENDIX D

THE ANGLO-SAXON PERSPECTIVE

"Nothing is illegal if a hundred businessmen decide to do it." [1]

A)INTRODUCTION

This appendix will undertake an evaluation of the classification and enforcement of competition law in the UK, examining the scope and application of enforcement powers and defence rights and their effectiveness in securing policy goals. Limitations of space mean that is only possible to review the approach under the Restrictive Trade Practices Act 1976 (RTPA) [2]. This appendix will follow the same format as used in the main text. First, the goals of UK antitrust and the guidance available to UK enforcers will be examined. Then, the legislation and the institutions involved in enforcement will be outlined. Finally, the enforcement process will be evaluated.

B)GOALS AND GUIDANCE

1)Guidance

As with most jurisdictions, the UK chooses not to define competition, to provide explicit guidance on decision-making, or to enumerate policy goals. But, it is clear from official reports that competition is regarded as important in promoting economic welfare by providing a spur to efficiency and enhancing consumer sovereignty [3].

Little guidance exists to aid decision-makers. Some official booklets giving guidance to industry have been issued [4]. They are not legally binding and the UK's emphasis on pragmatic decision-making means that there is no guarentee that the guidance given in the booklets will be followed by the OFT. Additional guidance is provided in the Director General's (DG) *Annual Reports*, but is normally very general in character. Various reports do discuss further the criteria applied in selecting agreements for exemption under s.21(2) RTPA, where restrictions are not significant [5]. The Reports make clear that the DG's approach is pragmatic with each case being examined on its merits, considerind whether competition is restricted or public detriment results [6].

In face of the UK's pragmatic approach to decision-making, the goals of UK competition policy are difficult to identify. This has resulted in there being no coherent approach to UK competition policy [7]. Some goals can be detected and these will be outlined below. Discussion is necessarily brief as it is a feature of UK competition law that scant information is available on the subject.

2)Economic/Non-Economic Goals

a)Politics

Whilst there is no clear mandate requiring UK competition authorities to adhere to any particular economic theory, the recent Conservative goverment's strong emphasis on

free market enterprise, clearly linked to the Austrian economic theory, means that competition decisions will inevitably reflect this political ideology [8]. Consequently, the UK is strongly committed to promoting competition in all spheres. This has had considerable impact on the UK's competitive enviroment, resulting in a programme of privatisation and the removal of all restrictions and barriers on competition allowing entrepreneurs to operate and flourish. As such, this desire to maximise business freedom forms a clear political goal of UK competition enforcement [9].

b)Consumer Sovereignty

A further fundamental aim of UK policy is the enhancement of consumer sovreignty. On several occasions, the DG has discussed how competition policy and consumer protection complement each other [10]. He has argued that the competitive process only works efficiently when consumers can make informed choices regarding their purchases, thereby requiring suppliers to meet those demands and resulting allocative efficiency. Moreover, that consumers exercise their rights of redress is regarded as an important part of the process [11].

c)Pragmatism

Whilst the economic objectives of UK competition policy are significant, of considerable importance in the UK is the non-economic goal of pragmatism. Although this more an approach to decision-making than an objective, within the UK, the cost-efficient, non-adversarial negotiation of competition issues is seen as an end in itself and it dominates most UK decision-making. Official reports time and again endorse pragmatism as the only approach to competition decisions. It is regarded as essential to ensuring flexibility and allowing competition policy to adapt to political and commercial developments [12]. As a result, great emphasis is placed on the low-key, conciliatory resolution of competition matters. This pragmatic approach is not only cost-effective, but is also consistent with the prevailing political ideology's deference to entrepreneurial freedom.

At the basis of this pragmatic approach is the concept of public interest and UK competiton law's insistence that each case is assessed individually against the public interest. Borrie acknowledges that it is a "difficult and controversial" concept, but argues that its paramouncy within the UK system ensures adaptability and vitality [13]. Little formal guidance on what constitutes the public interest exists, leaving considerable discretion in framing the ambit of this concept [14]. Furthermore, the pragmatic implementation of competition law ensures that the definition of the public interest is not immutable. The amount of discretion at work within UK competition policy seems to be increasing. O'Brien argues that behind the facade of form-based legislation, there has been a "silent revolution" in the operation of UK competition policy from a very legalistic approach to a highly discretionary process [15]. So, although reform of UK competition law is imminent, the pragmatic nature of UK decision-making may well remain unchanged. Indeed, Borrie has indicated that competition law must remain flexible, striking a balance between economic efficiency and fairness. He warns that competition must never be regarded as an end in itself and that the public interest must always remain paramount [16]. Inevitably this discretionary, pragmatic approach brings with it problems. It creates uncertainty and may result in inequality, bringing it into direct conflict with articulated goals of fairness and transparency. Moreover, the very flexibility of the approach ensures that there is no

clear standard against which to assess the equity and consistency of UK competition decisions [17].

3)Conclusion

Like other systems, the UK fails to define competition, to make explicit its chosen goals or to provide clear guidance on decision-making. Like the US, the UK has no counterpart to the EC's objective of market integration. The most notable goal in the UK is its insistence on a non-adversarial approach to enforcement, making pragmatism itself a vital aim of UK competition law.

In comparison with other systems, the UK places very little emphasis on economic efficiency. Whilst efficiency is broadly endorsed as part of the prevailing political ideology, the UK's emphasis on public interest makes it difficult to identify efficiency as a precise objective of UK antitrust, considerably reducing its significance as a specific goal of UK law.

The UK's approach to non-efficiency goals also differs somewhat from other systems. Its primary focus on pragmatic decision-making is of such extent that it masks the other aims of UK antitrust.

But, much common ground exists with other jurisdictions. Like other processes, political and pragmatic needs form clear aims of enforcement. In the UK, the political goal may be viewed in terms of the needs of the prevailing political ideology. Like other systems, the UK faces resource shortages which obliges it to apply antitrust rule cost-efficiently. But, in addition to and quite apart from resource considerations, the UK culture places great emphasis on the non-adversarial resolution of all defferences, thus making the needs of pragmatism its primary focus

C)LEGISLATION - RESTRICTIVE TRADE PRACTICES ACT 1976 [18]

Broadly, this Act requires certain restrictive agreements involving collusive behaviour to be registered with the Office of Fair Trading (OFT). Unless the parties are able and willing to modify the agreement, the Director General (DG), with some exceptions, must refer the agreement to the Restrictive Practices Court (RPC) for a decision [19].

1)Registrable Agreements

Generally, the RTPA deals with horizontal rather than vertical restraints. Indeed, the Act exempts from registration many common types of vertical agreement [20]. Four categories of restrictive agreement relating to the supply of goods or services and information agreements on goods or services are registrable under the Act [21]. Any agreement which is caught partially by one provision and partially by another is not registrable as the sections are discrete and not cumulative [22].

a)Restrictive Agreements Relating to Goods [23]

Section 6(1) deals with agreements relating to the supply of goods which contain restrictions regarding price-fixing, market sharing, terms and conditions and with whom to deal. The main elements of s.6 will be briefly outlined [24].

i)Agreement

As with similar legislation, the offending conduct must be the result of some form of agreement. Whilst the precise scope of this requirement has been the subject of recurring controversy, the Act and subsequent caselaw make it clear that the entire

spectrum from formal agreement to informal arrangements and practices are registrable where the essential elements of mutual rights and obligations exist [25].

ii)Restriction

For an agreement to be registrable, two parties must accept a restriction [26]. Again, problems of scope exist. Whilst the Act provides that a restriction includes a negative obligation, problems abound, particularly in determining whether a positive contractual obligation imposes a registrable restriction [27]. The Court's attitude has been to place a narrow construction on this requirement [28].

iii)Two or more persons carrying on business within the UK

To be registrable, the agreement must be between two or more persons carrying on business within the UK. Where only one party operates within the UK, whilst not registrable under the RTPA, the agreement may be subject to investigation under other legislation [29]. In addition, the restraints must be accepted by at least two parties to the agreement. These parties need not carry out business within the UK, providing at least two other parties to the arrangement do.

b)Exemption from Registration

A further complication is that some agreements which would otherwise be registrable are exempted from registration under ss.9 and 28 RTPA. Section 9 requires that certain restrictions be disregarded when determining the registrability of the agreement. The most important provisions are ss.9(3), 9(4), both of which are highly complex and the subject of some debate. Section 9(3) provides that any *term* relating exclusively to the *goods supplied* should be disregarded. However, s.9(4) states that where there is also a horizontal restriction, s.9(3) does not apply. Thus, these subsections reflect the Act's overall concern with horizontal rather than vertical restraints, by clearly facilitating the imposition of vertical restrictions, particularly territorial restraints. This position is in stark contrast to the European Commission's tough stance against export bans [30].

In addition, s.28 exempts certain types of agreement listed in Schedule 3. This provision bears some similarity to EC block exemptions [31].

D)INSTITUTIONS

One of the central features of UK competition law is the excessive number of institutions concerned with its application and enforcement. Those concerned with the enforcement of restrictive trade practices will be reviewed below.

1)Office of Fair Trading (OFT)

This department is headed by the DG and is the main body concerned with competition policy [32]. The DG has come to play an increasingly central role in the formulation, implementation and enforcement of competition law. One important feature is the DG's independence from the government in many areas. Thus, he may personally instigate monopoly and competition references, though elsewhere, he may only advise the Minister [33]. In relation to the RTPA, the DG maintains a register of agreements. Where appropriate, he refers these agreements to the RPC. One of the DG's most valuable functions is in maintaining the UK's pragmatic approach to enforcement, by obtaining the amendment or abandonment of anti-competitive

restraints and securing undertakings from firms as to their future behaviour [34]. In addition, the OFT liases with the European Commission on EC competition matters [35].

2)Restrictive Practices Court (RPC) [36]

The RPC is of compound composition [37]. Their role is to decide whether restrictive practices and rpm are in the public interest. In practice, firms' unwillingness to defend their agreements in court has meant that the RPC's role in competition policy has atrophied [38].

3)Secretary of State

The UK system of competition law is headed by the Secretary of State for Trade and Industry who exercises many important powers [39]. In relation to restrictive practices, he may authorise the DG's s.21(2) directions and may exempt from enforcement agreements of national importance [40].

4)Civil Courts

The High Court may be used to invoke the common law restraint of trade doctrine and to take private actions for damages where loss resulting from anti-competitive conduct has been suffered [41]. In addition, RPC decisions may be appealed to the Court of Appeal on points of law. Where appropriate, further appeal to the House of Lords is possible.

E)ENFORCEMENT PROCESS - INVESTIGATION [42]

The remainder of the appendix will examine the enforcement process under the RTPA. Unfortunately, the current state of UK enforcement policy means that there is a general lack of information and critical commentary on UK competition law. However, as with other jurisdictions, the evaluation will attempt to assess the character and scope of enforcement powers and defence rights. Consideration will be given to whether and how these powers and protections are used as enforcement resources.

This section will assess the initial stages of the enforcement process considering the DG's investigation powers. Defence rights will then be discussed.

1)Registration

Details of registrable agreements must be forwarded to the DG who keeps a register which is open to public inspection [43]. The public nature of the register is extremely unpopular with industry. Anticipated reforms would abolish this [44]. Currently, provisions do exist to allow confidential information to be withheld from public inspection [45]. Where there are doubts over registrability, the OFT may be notified under the 'fail-safe' procedure, whilst reserving the question of registrability. This effectively passes the problem over to the OFT. Not surprisingly, the OFT has some reservations about this procedure, particularly as it may be used to notify the OFT of unmeritorious agreements. As the parties here have complied with their obligation to furnish particulars, these arrangements would be legally enforceable [46]. Numbers of

agreements submitted for registration have steadily increased. In 1980, 123 agreements were submitted for registration compared with 1,251 in 1993 [47].

Where parties fail to register a registrable agreement, certain consequences ensue. Firstly, the agreement is void in respect of the restrictions and cannot be enforced [48]. Moreover, the arrangement cannot be defended before the RPC [49]. Most importantly, the DG may apply to the RPC for a 's.35 order' requiring the cessation of the agreement or any other unregistered registrable agreement [50]. Breach of the injunction is punishable as a contempt of court. Finally, whilst s.35(2) makes it clear that failure to register is not a criminal matter, the parties involved may be sued for breach of statutory duty by anyone injured by the agreement. Problems of proof and quantum mean that actions are rarely brought and have, thus far, never been successful [51].

2)Fact-Finding Powers

In order to uncover covert cartels, the DG has certain, rather limited, fact-finding powers. Where he has reasonable cause to believe that a person is a party to an unregistered registrable agreement, he can serve a notice requiring that person to furnish particulars of any registrable agreements to which he is a party. The DG can also apply to the RPC for the party to be cross-examined under oath [52]. Criminal penalties exist for parties who fail to comply with a s.36 notice or who provide false information [53]. In addition, the DG may send a less formal 'polite inquiry' to the party. Such letters have no legal force and parties are not obliged to reply. It should be noted that this comprises the full range of investigation powers available to the DG. No power of search is granted [54].

Walker-Smith details a range of factors which govern the OFT's use of s.36 powers in detecting cartels. Broadly, the OFT will examine a number of structural and organisational factors which should indicate the likelihood of a cartel being in operation and which would facilitate the organisation, policing and maintenance of that cartel [55]. It is interesting to note that these criteria are largely economic in nature [56].

In practice, the application of the OFT's investigation powers has varied considerably. During the 1980s and early 1990s, there was a steady increase in the use of s.36 notices [57]. More recently, the use of these powers has waned dramatically. For instance, in 1993, whilst the OFT began 50 new investigations, only ten s.36 notices were issued that year [58]. Even less use has been made of s.37 and s.38 powers. Both sections have been employed only once [59]. The sparing use of these fact-finding powers is in stark contrast to the increasing number of complaints of anti-competitive behaviour received by the OFT [60].

A major problem has been the requirement that the DG must establish a reasonable belief in the existence of a covert agreement before a s.36 notice can be issued. The Court of Appeal have taken a strict approach to this, insisting that the DG must adduce strong prima facie evidence of improper conduct [61]. Consequently, in several recent cases, the DG has encountered difficulty in acquiring sufficient detailed information to obtain a s.36 notice [62]. The Court's restrictive interpretation has a further consequence. Where the DG is unable to obtain a s.36 notice, his other powers under s.37 and s.38 simply do not come into play. Combined with the absence of search powers, this situation makes it extremely difficult for the OFT to acquire sufficient evidence to take action under the RTPA. A number of commentators, including the DG himself, have criticised the unsatisfactory nature of these

investigation powers [63]. Indeed, Robertson notes that the provisions appear to be designed to assist evasion of competition rules [64].

3)Defence Rights [65]

As with other jurisdictions reviewed, the existence and scope of the defendant's rights of silence and confidentiality at investigation will be examined here.

a)Self Incrimination

No mention is made of this safeguard in the RTPA. But, the civil litigation setting of the legislation means that rules of civil procedure apply. This privilege is restricted in English civil proceedings. Evidential rules provide that this safeguard only applies in relation to criminal charges and penalties [66]. Section 35(2) states that a failure to register is not a criminal matter. More importantly, only the sanction of voidness may be imposed under the RTPA. This is clearly non-penal in nature. Thus, the defendant is not afforded any protection under these procedural rules. Moreover, the privilege does not generally apply to statutory requirements, like s.36, ordering disclosure [67]. Thus, in RTPA enforcement, the defendant is afforded no protection against self incrimination. Indeed, the legislation places him under a duty to co-operate. The fact that this may require defendants to reveal details of prohibited conduct will not justify non-disclosure. This obligation is reinforced by penalties [68].

In practice, the defendant's right to silence at investigation has provoked little interest or concern. No caselaw exists discussing this right and there is little critical review of such issues. Indeed, the OFT has never employed its power to sanction non-cooperation.

b)Confidentiality

As elsewhere, the defendant's right to confidentiality will be examined in the context of legal professional privilege

Again the rules of civil procedure govern this safeguard. These rules afford substantive protection to lawyer-client communications made for the purpose of giving or receiving legal advice, even before litigation is contemplated. Once litigation has commenced, a broader immunity exists to protect documents coming into existence for the specific purpose of the litigation [69]. Disputes over the scope of privilege are decided by the Court. In contrast to the EC position, English law extends this protection to cover communications between in-house lawyers and other members of the firm [70].

Once again, there is an absence of reported cases and information on the practical application of this protection within RTPA enforcement, making it difficult to assess its effectiveness.

4)Conclusion - Investigation

In summary, this account illustrates that the ambit and application of UK investigation powers are limited, particularly in comparison with those encountered in EC and US jurisdictions. The absence of search powers, the curtailed use of s.36 and the preference for informal enquiries reveal the administrative, non-adversarial character of UK restrictive trade practices enforcement. Indeed, Walker-Smith asserts that these powers are not strictly investigatory, but are merely an enforcement mechanism to support the legislative requirements regarding registration [71]. It is perhaps incongruous that in such a clearly administrative context the DG's s.36 powers should

be subject to the criminal control of 'reasonable belief'. It seems that this control reflects a basic political desire not to interfere unnecessarily in the business affairs of individuals [72]. Certainly elsewhere, the tenor of the legislation illustrates the political belief that cartels are not criminal. Thus, it appears that, in the UK, the law is interpreted and applied to promote that view. The formalism of the RTPA, the generous time limits and confidentiality provisions of the Deregulation Act, the 'fail-safe' procedure and the 'reasonable belief' control of s.36 all operate in favour of the defendant and therefore serve to maintain freedom of business conduct. Ultimately, it is this political belief which underpins the pragmatic conciliatory approach that is so characteristic of UK competition enforcement.

The RTPA's non-adversarial approach to enforcement is also evident in the classification, scope and application of defence rights. At investigation, the characterisation of defendants' safeguards is essentially administrative in nature. Their existence and scope are governed by civil procedural rules. Consequently, a privilege against self incrimination is non-existent. In its place is a duty to co-operate. Whilst sanctions for a refusal to assist are penal in nature, the OFT's failure to exact such sanctions means that, in practice, they pose little real threat to defendants. In contrast, legal professional privilege is recognised as a substantive right. Its broad scope may afford defendants some protection in the absence of a right to silence. Any disputes over the ambit of this safeguard are decided by an independent arbiter, reinforcing the level of protection afforded. The conciliatory approach to enforcement is also illustrated in the application of defence rights. Its most noticeable feature is the virtual absence of caselaw or concern over defence safeguards and a long-standing refusal to penalise non-cooperation under s.38. This suggests that, as with the interpretation of investigation powers, the law is used here to facilitate the pragmatic, non-adversarial resolution of enforcement issues.

Finally, whilst the OFT is clearly in control of the process, the mismatch between the OFT's powers and defence rights, noted in other jurisdictions, is not apparent here. The central theme of RTPA enforcement is the use of its administrative context to encourage a low-key, pragmatic approach to enforcement which is consistent with the prevailing political ideology. So, whilst political and pragmatic goals remain the central focus of antitrust enforcement, the means of their attainment under the RTPA are in marked contrast with zealous approach of the EC and US jurisdictions.

F)PROSECUTION

This section will first outline the procedure at prosecution and then go on to consider the factors affecting the decision to prosecute. Defence rights will then be addressed.

1)Procedure

Once registered, the DG is under a duty to refer agreements to the RPC [73]. Before doing so, the DG may attempt to persuade the parties to withdraw or amend offending restrictions. In addition. s.21 grants the DG a discretion to refrain from bringing proceedings in certain cases. The most important provision is s.21(2) which permits evaluation of the arrangement in its economic context [74].

2)The Decision to Prosecute

Whilst some guidelines outlining the DG's likely approach to restrictive practices do exist, more potent forces affecting prosecutorial decision-making are the legislative format and the prevailing policy goals [75].

a)Legislative Format

The format of the RTPA has had a major effect on the decision to prosecute and has been subject to trenchant criticism [76]. The most serious complaints may be summarised as follows. First, the legislation is formalistic and unnecessarily complex [77]. One of the most bizarre aspects of the RTPA's formalistic approach is the crossover problem. To be registrable, an agreement must fully satisfy the provisions of a particular section. It is not sufficient that it may satisfy particular aspects of several sections ; registrability cannot arise cumulatively [78]. Often this formalism results in manifestly anti-competitive agreements not being registrable because they do not fall clearly within one category [79]. Moreover, this form-based approach encourages avoidance rather than evasion of the rules. Careful drafting can place an agreement outside the scope of the Act, largely reducing the effectiveness of the legislation [80]. This problem has been exacerbated by the Court's restrictive interpretation of many elements of the RTPA [81]. Formalism has other consequences. The complexity of the legislation and the dislike of the public register have led to an estrangement of the law and frequent non-compliance. Indeed, the incomprehensibility of the rules has created the very legal uncertainty that the form-based legislation sought to avoid [82]. These problems have led many to dismiss the RTPA as inadequate and obsolete. The court-based approach to enforcement has served only to aggravate these difficulties and has been denounced as cumbersome and costly [83]. Such obstacles often discourage parties from defending agreements before the RPC [84].

b)Prevailing Policy Goals

The limitations placed on effective enforcement by the legislative format have served to highlight the political and pragmatic policy goals underlying RTPA enforcement [85]. Their overall impact has militated against formal enforcement of the RTPA with the result that the application of UK competition rules appears to be in a state of suspended animation [86]. O'Brien suggests that the reality of UK competition enforcement is not that it is non-existent, but that political and pragmatic influences have driven it underground. He argues that behind the facade of form-based legislation, there has been a "silent revolution" in the operation of UK antitrust, from a very legalistic, overt approach to a covert, pragmatic approach [87]. He asserts that, since 1973, competition legislation has placed increasingly greater power into the hands of the DG, to the point where he now plays a pivotal role in the formulation, application and enforcement of UK competition law [88]. Under the RTPA, this pragmatic approach takes place under s.21(2). Here, the DG's negotiating skills are vital in obtaining the amendment of unacceptable restrictions, thereby avoiding the need for full scale application of the formalistic element of the law [89].

The Deregulation Act 1994 has placed even greater emphasis on pragmatic and political solutions. Provisions for speeding up the decision-making process via the 'fast-track' procedure, The increased acceptance of undertakings in lieu of formal investigations and the enlargement of the de minimis rule have all enhanced the

pragmatic, flexible nature of competition enforcement [90]. Deregulation also permits greater political influence by taking enforcement issues out of the public arena, thus allowing them to be subject to increased centralised political influence [91]. The essentially political and pragmatic nature of UK competition policy has been noted elsewhere [92]. As a result of these influences, only 1% of cases are referred to the RPC [93].

Clearly, the formalistic nature of the RTPA and the influence of political and pragmatic goals have a major impact on the DG's prosecutorial decision-making. At every point, they encourage the pragmatic, informal resolution of restrictive practices.

3)Informal Resolutions [94]

This section will first evaluate the resolution of cases under s.21(2). Then, other informal processes will be considered.

a)S.21(2)

This section attempts to overcome the RTPA's inflexibility by entitling the Secretary of State to discharge the DG from his duty to refer an agreement to the RPC where the restrictions "are not of such significance as to call for investigation by the Court" [95].

The first stage in the s.21(2) resolution process involves, sometimes extended, negotiations with the OFT to obtain the abandonment or modification of problem restrictions. Once only insignificant restrictions remain, the way is clear for a representation to the Secretary of State under s.21(2) [96].

Clearly, of central importance is what constitutes a significant restriction. Unfortunately, this term is not defined by the RTPA or by subsequent caselaw. The OFT has provided some guidance. The DG has indicated that a restriction will be significant if it is detrimental to consumers or traders or results in unfairness or discrimination [97]. Quite what this encompasses has been the subject of some academic debate. Green insists that the assessment of significance is entirely an economic matter which does not allow public interest considerations to be taken into account. Other commentators, whilst making it clear that an economic evaluation of the market context is important, clearly envisage that the assessment may take into account non-competition issues [98]. Indeed, the DG himself has made it clear that his wider brief of ensuring fair trade affects his evaluation of s.21(2) [99]. What is clear is that the OFT's evaluation is pragmatic and individual in nature and focuses on the *restriction* involved [100]. In this way, it differs from the EC's de minimis provisions under which certain agreements fall outside Art.85(1) because the agreements themselves are economically insignificant. Moreover, under the de minimis doctrine, the guiding factors are the size and turnover of the firm involved, whilst s.21(2) is concerned with the nature of the restriction accepted [101]. The DG's 1980 Report did provide some guidance on the types of arrangement generally regarded as suitable for s.21(2) directions. They include joint ventures and franchises [102].

Once the DG is satisfied that the restrictions are insignificant, a representation is submitted to the Secretary of State. This submission takes the form of a detailed legal and economic analysis of the agreement [103]. Parties have no right to inspect the representation. Even where the Secretary of State accepts the insignificance of the restrictions, he is not bound to grant the DG directions discharging him from his duty to commence proceedings [104]. Directions may be withdrawn where there has been a material change in circumstances [105].

In practical terms, s.21(2) directions are of fundamental importance to RTPA enforcement [106]. In contrast with the handful of agreements which go before the RPC, large numbers of cases are resolved under s.21(2) [107]. Sometimes details of s.21(2) directions are mentioned in the DG's Annual Reports. Most recently, the Reports have discussed directions granted in respect of the *Building Societies Association*, and agreements by *Birmingham Taxi Drivers* and the *Heating and Ventilating Contractors' Association* [108]. Occasionally, the DG indicates that he wishes to examine the effect of an agreement before acting under s.21(2). This occurred most recently in relation to the *Switch* agreement [109].

b)Other Informal Processes

As well as obtaining resolution under s.21(2), the other provisions of s.21 provide additional means of informal settlement [110]. For instance, the DG may negotiate with firms to obtain voluntary non-binding assurances as to future conduct, thereby avoiding formal proceedings. Most recently, such assurances were received from certain firms involved in the milk retailers' price-fixing and collusive tendering agreements [111].

However, there has been some criticism of informal resolutions, particularly those occurring under s.21(2). Whish has condemned the mystery surrounding the provision's assessment of 'significance'. He argues that, despite the section's fundamental importance to enforcement, scant information is available regarding the criteria employed in the evaluation and their relative weight in the assessment of individual agreements. He asserts that the information provided is so generalised as to be valueless [112]. In addition. the negotiations surrounding s.21(2) settlements can be protracted. Overall, the result is to create extensive legal uncertainty regarding the application of s.21(2) [113]. Whish maintains that this legal uncertainty reduces the effectiveness of UK competition policy in promoting joint ventures and research and development projects under s.21(2) [114]. Finally, whilst it seems that no overt public interest assessment by the OFT is permitted under s.21(2), ultimately, the decision is at the Secretary of State's discretion, allowing covert political influences to occur [115].

4)Defence Rights [116]

This section will evaluate the existence and scope of the defendant's right of disclosure and the safeguards available during informal resolution.

a)Access

As enforcement of the RTPA takes place in a civil litigation setting, defendants have a substantive right to 'discovery'. This process requires the mutual disclosure of all relevant, non-privileged material [117]. 'Public interest immunity' will generally operate to protect the confidentiality of internal government documents [118]. In acquiring such information, defendants face an onerous burden. A very strong case of relevance and necessity must be established before disclosure of such documents would be ordered [119].

As regards the disclosure of other confidential information, such as business secrets, the public nature of the register makes much information accessible unless the parties succeed in having it placed on the special section of the register [120]. This situation would seem to make it difficult for the OFT to withhold disclosure to serve

enforcement needs. However, the recent extension of the special section of the register may give the OFT greater lee-way for manipulation of the law [121].

Once again. little information exists on the practical exercise of this safeguard. No evidence of problems or complaints in relation to RTPA enforcement is available, making its effectiveness difficult to gauge.

b)Defence Safeguards in Informal Resolutions

In contrast to the substantive rights enjoyed by defendants in formal litigation, no clear defence rights exist in the context of informal resolutions under s.21(2). Though it would seem that the OFT are under a basic duty to act fairly [122]. As noted elsewhere, the context of informal resolutions does pose a problem for defendants. Again, the process tends to operate very much in the prosecution's favour and to the defendant's disadvantage. Several points are worth mentioning. The informality of the procedure permits the OFT to pressurise defendants to settle under threat of protracted and expensive reference to the RPC. Following negotiations, defendants have no right to be involved in the drafting of the representation to the Secretary of State. Indeed, they do not have a right to inspect the document. Consequently, the reasoning and conclusions of the report could bear little resemblance to the discussions in which they participated. Yet. defendants' ignorance of this would them powerless to act. Finally, while the DG undertakes a legal and economic evaluation of the agreement under s.21(2), the ultimate decision on the matter is essentially political [123]. This situation permits covert political factors to influence the decision. Again, the defendant would be unaware of such influences and so be unable to intervene [124]. In contrast, the s.21(2) process benefits the DG enormously, delivering pragmatically and politically effective enforcement on a routine basis.

Section 21(2) directions do offer defendants some protection. Directions may not be withdrawn unless there has been a "material change in circumstances" [125]. It seems that the Secretary of State would face a high evidential burden in establishing this [126]. Whilst withdrawal has never been used, the threat of it has been employed as leverage to obtain variations of agreements. Moreover, s.21(3) may be used for political ends [127]. However, s.21(2) directions will not protect parties from private actions [128].

Defendants' rights of appeal may offer some protection. Both the DG's and the Secretary of State's exercise of discretion under ss.21(2) and(3) are subject to judicial review [129]. However, the wide margin of discretion afforded under these provisions and the absence of clear criteria for their use, renders review problematic [130]. The effectiveness of judicial review has been limited further by the Court's non-interventionist stance which has stressed the need for "good public administration" [131]. As a result, few firms attempt judicial review and even fewer succeed [132].

5)Conclusion - Prosecution

It is now apposite to review the classification, scope and enforcement value of the DG's powers and defence rights. At prosecution, the DG possesses wide discretionary authority. At every point, this discretion is used as a resource to obtain the pragmatically and politically acceptable resolution of enforcement issues. The UK's preference for informal processes is nowhere better evidenced than in the ratio of cases resolved under s.21(2). This approach provides significant political and pragmatic advantages, routinely ensuring the cost-effective negotiation of agreements with the ultimate decision being taken by a political superior. Indeed, this evaluation reveals

that the very structure of the legislation militates against formal enforcement, thus encouraging more informal solutions to be sought. Inevitably, this discretionary approach brings problems. Overall, it creates uncertainty and may result in inequality. The absence of clearly enunciated criteria, the possibility of covert political influence and the general flexibility of the approach make it difficult to forecast how these powers will be exercised, raising concerns over the equity and consistency of prosecutorial decision-making. Despite this, there is no clear indication that this political and pragmatic enforcement approach will change [133]. Indeed, the UK's most recent response has been towards deregulation which only serves to promote this policy. Most potently, deregulation takes enforcement out of the public arena encouraging greater use of pragmatic resolutions and allowing covert political influences to flourish. As such, deregulation gives legislative effect to O'Brien's claim that competition enforcement has gone underground. The adoption of such a secretive approach is a strange a response at a time when other jurisdictions are opting for more overt control. More worringly, deregulation may be viewed as a move towards the abandonment, or at least the reduction of, UK antitrust enforcement : a move which Fox has condemned ad "capitalism with a vengance" [134].

Defence rights at prosecution vary in scope, though their classification is clearly admiinstrative. In formal situations, defendants enjoy a broad right to the discovery of documents. Whilst this safeguard is a substantive one and thus should afford significant protection, the absence of information on its application makes it impossible to assess its effectiveness in upholding the defendant's right to be heard.

In informal situations, defendants are afforded few safeguards. No substantive defence rights exist. In their place is a broad duty on the OFT to act fairly. This places due process safeguards entirely at the discretion of the enforcement authority. As a result, this requirement may be routinely interpreted to meet political and pragmatic enforcement needs. Defendants are afforded little procedural protection from the OFT exerting pressure on them during s.21(2) negotiations, or under s.21(3) to obtain a solution acceptable to enforcement requirements. Nor are defendants permitted to comment upon, or indeed have any knowledge whatsoever of, the final representation to the Secretary of State. The lack of transparency regarding s.21(2) criteria leaves no clear standard by which to assess the OFT's conduct, limiting the defendant's ability to appeal. Thus, the OFT's duty to act fairly may serve to limit the defendant's knowledge of the case against him and the effectiveness of his right to comment. Nor does the OFT's obligation protect defendants from covert political influences on decision-making. Indeed, the final decision is taken by a politician, raising questions over the independence of the tribunal under s.21(2). Clearly, the informal context enables the OFT to place serious limitiations upon the scope and effectiveness of defence rights in the interests of enforcement. Yet, this approach is affirmed by the Court's robust support of political and pragmatic rationales at judicial review.

In summary, during formal enforcement the strengths of the prosecution and defence are broadly balanced. But, in negotiated resolutions, the disparity between the two positions is marked. The overwhelming use of s.21(2) means that defendants are routinely placed at a disadvantage. Two features of RTPA prosecution must be emphasised. Firstly, there is a striking absence of caselaw or comment upon the existence and scope of defence rights at this stage. It appears that defence safeguards simply do not feature in RTPA enforcement. Finally, and most notably, is the continued insistence at prosecution that enforcement occurs in line with political and pragmatic objectives.

G)TRIAL AND SENTENCE [135]

1)Reference to the Court

It is intended only to undertake a brief examination of this procedure because of its relative unimportance to RTPA enforcement in practice [136].

Where alternative means of resolution are unobtainable or inappropriate, the DG must refer the agreement to the RPC for a decision on its status. The RPC operate from the presumption that the agreement is contrary to the public interest and void, unless the parties can demonstrate, on a balance of probabilities, that the agreement satisfies one of the statutory defences known as 'gateways' [137]. These gateways largely relate to the economic benefits of the arrangement, though some identify social and political advantages [138]. Even if the parties succeed in passing through a gateway, they must overcome the 'balancing tailpiece' of s.10. Here, the parties must establish that the restriction is not unreasonable, having regard to the identified benefit(s) of the agreement and any wider issues of detriment to the public interest. This assessment is similar to the balancing of benefits and detriments under Art.85(3) of the Treaty.

In practice, very few agreements are referred to the RPC and even fewer succeed [139]. Many agreements go undefended, whilst numerous others are simply abandoned [140]. There are several reasons for this state of affairs. Firstly, whilst many of the gateways are unproblematic in scope, some are so narrowly drafted that they have never been penetrated successfully [141]. Conversely, the width of gateway (b) has evoked extensive criticism because it requires the Court to indulge in economic speculation. Many of the RPC's economic evaluations have been denounced as unpredictable and inconsistent [142]. The gateways have also been condemned in terms of the policies they embody and the decisions they generate. This is particularly so of those gateways which contain explicit political considerations [143]. Considerable controversy also surrounds the 'balancing tailpiece' of s.10 which requires the RPC to undertake a public interest assessment of the agreement. The complex balancing act which this requires of the Court and the RPC's frequently narrow interpretation of the public interest has attracted criticism from economists and has raised questions over the justiciability of the issues involved [144].

There has been considerable censure of the nature of proceedings before the RPC. The expense, the delays and the "bullying tactics" of the adversarial process have all been condemned by businessmen [145]. More pertinently, Lever asserts that many outcomes are merely the result of the adversarial process and the placement of the burden of proof which allows one outcome rather than another to be reached [146]. Consequently, the adversarial process, particularly in the legalistic context of the RTPA, has been denouced as an inadequate and inappropriate means of economic regulation because of its inability to take account of the wider economic context [147].

The overall consequence of these problems is that it is almost impossible to negotiate s.10 successfully. This has discouraged many beneficial collaborations between firms and has increased calls for reform [148]. More worringly, it has encouraged widespread non-compliance with the RTPA. Given the lack of deterrence and the improbability of detection, many firms prefer to run the risk of operating an unregistered, registrable agreement rather than defend it before the RPC. That many firms evade registration seems to be confirmed by the relatively high proportion of cases coming before the RPC under s.35 [149]. Even so, the Court hear very few cases each year, leaving many to conclude that it is all but redundant [150].

2)Sanctions [151]

Sanctions under the RTPA are extremely limited. Where the agreement fails the requirements of s.10, the Court may make a declaration that the agreement is contrary to the public interest and thus void [152]. Following this, the Court must decide whether the offending restrictions may be severed from the agreement. Normal contractual principles apply [153]. In addition to its declaratory powers, the RPC may also make orders restraining the parties from giving effect to the offending restrictions or from making further agreements "to the like effect" [154]. Some problems have arisen in the interpretation of this phrase. First, there is little judicial guidance on what degree of similarity must exist between original and subsequent agreements for this test to be satisfied [155]. The resulting uncertainty has been aggravated by the Court's insistence that the evaluation is very much an individual one dependent on the circumstances of the case [156]. Moreover, the RPC have tended to view matters liberally making it even more difficult for parties to avoid concluding an unacceptably similar agreement [157].

In addition, powers exist allowing the variation and suspension of court orders [158]. Interim injunctions are also possible [159]. The high burden of proof on the DG means that these powers are rarely used. More often, the threat of s.3 proceedings is employed to obtain the abandonment of restrictions [160].

Instead of issuing an injunction against the parties involved, the RPC may accept undertakings from them [161]. This practice is widespread. Undertakings in lieu of court orders have been accepted in many recent price-fixing/market sharing cases [162]. Breach of the Court's order is a civil contempt and punishable as such. The RPC have taken a strict approach and imposed fines in a number of cases, most recently in *Ready Mixed Concrete* [163]. The Court have made it clear that individual employees are punishable as well as the firms themselves. In *Ready Mixed Concrete*, two employees were fined £2,200 in total for aiding and abetting the contempt. Imprisonment is also possible [164]. Custodial sentences are most likely where there has been a deliberate flouting of a court order [165].

Recent developments in respect of contempt proceedings may have made enforcement against restrictive agreements more difficult. In *DG/OFT v Smith's Concrete Ltd*, the Court of Appeal quashed the RPC's finding that the firm was vicariously liable for an employee who had entered a price-fixing agreement and was thus in contempt [166]. The Court held that, as the firm had instituted a compliance programme which expressly forbade the entering of restrictive agreements, it had taken all reasonable steps to prevent a breach of the order. Thus, it was not vicariously liable for the employee. On further appeal, the House of Lords reversed the Appeal Court's decision, holding the firm vicariously liable [167]. This difference of opinion between the Lords and the Appeal Court's attitude may have significant implications for the OFT. To enforce against contempt, the DG must now establish both participation in a registrable agreement and that the empolyees concerned were acting deliberately and within the scope of their authority. This may be extremely difficult to achieve where a compliance programme exists [168]. Robertson has been particularly critical. He argues that not only may these developments further limit the DG's weak enforcement powers, but they may relieve firms from the obligation to institute meaningful compliance programmes making reform of the RTPA imperative [169]. Doubtless such a conflict of opinion will encourage further challenges and it may be some time before the law in this area is clear.

Overall, sanctioning powers under the RTPA have been extensively censured as inadequate and ineffective [170]. The sole sanction of voidness provides no real deterrent to determined cartelists. In effect, a party must offend twice before they can

be sanctioned by a fine. The stark contrast this poses with the sanctioning powers of other jurisdictions has served to heighten calls for urgent reform [171].

3)Defence Rights

At trial, the main defence safeguards are the rights to comment and to an independent tribunal. These protections may be dealt with briefly. As proceedings take place before the RPC, defendants have a substantive right to both safeguards. Little additional comment can be made about their effectiveness, as once again, there is little critical comment and even less caselaw on the matter. However, widespread dislike of the adversarial process and reports of the intimidation of witnesses in court do raise questions about the practical value of these rights [172]. In addition, concerns exist over the independence of the judiciary and its inclination to take decisions which uphold the Conservative Party's political viewpoint [173].

Some appeal possibilities exist. These may afford defendants further protection. However, opportunities for appeal are limited. The RPC's decisions are not open to judicial review. Appeal is to the Court of Appeal on points of law only [174]. Consequently, cases are rarely appealed [175].

4)Conclusion - Trial and Sentence

Having examined enforcement powers and defence rights at trial, it is now necessary to assess their classification and enforcement value. The civil litigation context of enforcement powers at this stage gives trial powers a clearly administrative characterisation. The ambit of s.10 does embody some political and pragmatic advantages. For instance, some gateways allow for explicitly political considerations, whilst the public interest assessment permits both political and pragmatic objectives to influence decision-making. But, the scope and application of enforcement powers has been the focus of extensive criticism. The narrow, legalistic drafting of s.10, the adversarial tactics of the litigation process and the heavy burden on defendants at trial have all been used as resources to ensure that few agreements are referred to the RPC and even fewer succeed at trial. Moreover, the equity of a system which can dictate the outcome by the politic placement of the burden of proof rather than on the basis of substantive evidence, must be questioned. Far from assisting the transparent and effective enforcement of RTPA rules, the chief outcome of this restrictive approach has been the widespread evasion of the law and the virtual redundancy of the RPC - a structure intended to be the central focus of the system. Once again, the Act's formalism has served to limit the usefulness of enforcement powers, militating against formal enforcement and encouraging more pragmatic and covert solutions. These themes are repeated in the context of sanctioning.

Sanctioning powers are of mixed classification. Whilst the main sanction of voidness and the provision for interim and final injunctions is administrative in nature, sanctions following contempt are clearly penal. However, they all suffer from the same problems. Their scope and the limitations placed upon their application reduce their enforcement value and discourage their use. Over the years, the sanction of voidness has proved itself a worthless enforcement tool. The inability to impose a fine at the outset has deprived the RTPA of any deterrent value, encouraging evasion rather than compliance. Moreover, the Court's interpretation of its orders has caused problems. The liberal construction and lack of clear guidance regarding 'like effect' orders has created legal uncertainty, producing problems for firms attempting to conclude an acceptable contract. The high burden placed on the DG in obtaining interim injunctions and in contempt proceedings has curtailed the value of these enforcement powers. Particularly in contempt actions, the burden placed on the DG by the Court encourages firms to pay only lip-service to compliance. As such, these sanctions serve to protect offenders and incite them to flout the rule of law. Such perverse and ineffective powers encourage the DG to seek more pragmatic means of enforcement.

At trial, this is seen in the use of interim powers as leverage to obtain settlements, and most vividly, in the DG's preference, even in formal situations, for undertakings rather than formal court orders. This conciliatory approach towards cartellists is in marked contrast with the attitude of other jurisdictions. But, its true value must be questioned given the regularity with which the DG is forced to pursue s.35/contempt proceedings. That such actions comprise the majority of the DG's trial activities, suggests that, in reality, this indulgent attitude assists rather than prevents evasion of competition rules.

The influence of political aims on sanctioning is also apparent. The RTPA's formalism, the high burden of proof on the DG, the preference for undertakings and the total absence of real deterrents all reflect a political desire to deal with cartellists leniently. These political undercurrents have rendered the RTPA impotent.

Defendants at this stage enjoy substantive rights at trial and appeal of an administrative character. Some questions have been raised regarding the effectiveness of these safeguards. Unfortunately, the absence of clear data has made it difficult to assess the extent of these problems. Once again, the central feature of the evaluation of defence rights has been the lack of critical commentary on defence issues. It would seem that the very structure of the RTPA, which discourages formal enforcement and encourages conciliatory resolutions, militates against an insistence upon, or discussion of, formal defence protections.

In summary, the dearth of incisive sanctions and the hurdles placed in the way of the DG's enforcement powers at this stage, offer considerable protection to those who behave anti-competitively. In practical terms, this places defendants at a significant advantage. Thay may act as they please, safe in the knowledge that the DG can do very litte about it. Above all, the evaluation has revealed that the central themes of RTPA enforcement remain unchanged at trial. The limitations placed upon the scope and application of enforcement powers continue to discourage formal solutions whilst protecting enforcement methods which serve political and pragmatic requirements. As a result, the reality of restrictive practices enforcement in the UK relies exclusively on the private negotiation and conciliation of anti-competitive agreements - O'Brien's "silent revolution".

TABLE 1

UK Enforcement Statistics *

	1980	**1981**	**1982**	**1983**	**1984**
Complaints/ Enquiries received by OFT	681	982	959	908	972
S.36 Notices	19	22	-	20	8
Total Number of Agreements added to Register [1]	123 (63)	258 (67)	154 (65)	198 (127)	221 (83)
S.21(2) Directions	38	49	29	27	71
Agreements Referred to RPC	1	-	-	1	- [2]

TABLE 1 (cont)

	1985	**1986**	**1987**	**1988**	**1989**
Complaints/ Enquiries received by OFT	1,037	962	1,122	804	1,207
S.36 Notices	28	55	22	97	32
Total Number of Agreements added to Register [1]	296 (127)	458 (215)	700 (325)	973 (512)	998 (520)
S.21(2) Directions	121	177	234	666	1,070
Agreements Referred to RPC	- [3]	66 [4]	-	7	4

TABLE 1 (cont)

	1990	**1991**	**1992**	**1993**	**1994**
Complaints/ Enquiries received by OFT	1,514	1,690	1,643	1,577	1,622
S.36 Notices	72	71 [5]	15 [6]	10 [7]	12
Total Number of Agreements added to Register [1]	676 (nk)	619 (nk)	589 (nk)	686 (nk)	622 (nk)
S.21(2) Directions	467	321	503	711	742
Agreements Referred to RPC	4	6	1	2	2

Notes - Table 1

* - Information derived from *DG/OFT Annual Reports*. All totals relate to the total number of goods and services agreements in that year.

nk - Amount not known as details were not provided in the *DG/OFT Annual Report*.

1 - The number of goods agreements included in the total is given in brackets.

2 - In 1984, no new agreements were referred to the RPC, but some contempt proceedings took place.

3 - In 1985, no new cases were referred to the RPC, but two Court orders were made.

4 - Of these agreements, 64 were goods agreements relating to the *Ready Mixed Concrete* cartel.

5 - In addition, in 1991, 62 new investigations were started.

6 - In addition, in 1992, 50 new investigations were started and a number of formal letters were issued.

7 - In addition, in 1993, 50 new investigations were started and a number of formal letters were sent.

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1 Andrew Young.

2 As will be seen, this statute is broadly analogous with Art.85, though in practice, the provisions of the Fair Trading Act 1973 and the Competition Act 1980 may be used against restrictive practices. For further information on these Acts, see Whish *Competition Law* Butterworths (1993) Chs 3-4. Unless otherwise stated, all statutory references below refer to provisions of the RTPA.

3 See eg Home Office *DG/OFT Annual Report 1985* HC Papers 1985/86 (403) HMSO at p 11 ; Home Office *DG/OFT Annual Report 1989* HC Papers 1989/90 (502) HMSO at p 13.

4 See eg OFT Guides *Restrictive Practices* (1985) and *Cartels : Detection and Remedies* (1991).

5 S.21(2) will be discussed further later in the analysis of the informal settlement of UK cases. See 'Informal Resolutions' infra.

6 See Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at pp 49-51.

7 This much has been acknowledged by a former DG. See Borrie 'Competition Policy in Britain : Retrospect and Prospect' *Int Rev Law and Econ* [1982] 139.

8 For further discussion, see Liesner and Glynn 'Does Antitrust Make Economic Sense?' *ECLR* [1987] 344 at pp 361-362. As yet, it is uncertain what effect the recent change from a Tory to a Labour goverment will have on matters, though it seems likely that free market enterprise will continue to be promoted.

9 For further on the programme of privatisation, see Whish *Competition Law* Ch10. Many acknowledge the importance of promoting business freedom in UK competition law. On this, see eg Borrie 'Retrospect and Prospect' ; Liesner and Glynn 'Does Antitrust Make Economic Sense?' ; Korah *Competition Law in Britain and the Common Market* Martinus Nijhoff (1982a) Ch5

10 See eg *DG/OFT Annual Report 1989* HC Papers 1989/90 (502) HMSO.

11 *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at pp 13-18.

12 On this, see *DG/OFT Annual Report 1985* HC Papers 1985/86 (403) HMSO at pp 10-13 ; *DG/OFT Annual Report 1991* HC Papers 1991/92 (38) HMSO at pp 9-10. Also Borrie 'Retrospect and Prospect'.

13 For further, see Borrie 'Retrospect and Prospect' at p 141.

14 Some guidance on the meaning of public interest is given in s.10 RTPA. Additional guidance may be gleaned from s.84 Fair Trading Act 1973 which deals with public interest in relation to monopolies.

15 O'Brien 'Competition Policy in Britain : The Silent Revolution' *Antitrust Bulletin* [1982] 217.

16 Borrie 'Retrospect and Prospect'.

17 These problems are discussed further in O'Brien 'The Silent Revolution' ; Borrie 'Retrospect and Prospect' ; George and Joll 'The Legal Framework' in GEORGE and JOLL (Eds) *Competition Policy in the UK and EC* Cambridge Unv. Press (1975) p 14.

18 Background information is derived from : Korah *Competition Law* (1982a) ; Whish *Competition Law* Ch5 ; Agnew *Competition Law* Allen and Unwin (1985) Ch7 ; GEORGE and JOLL (Eds) *Competition Policy in the UK and EEC* ; Pratt 'Changes in UK Competition Law : A Wasted Opportunity' *ECLR* [1994] ; D.Jacobs 'Competition Law' *BLR* [1982] 131 ; Frazer 'Defects and Effects - Competition Policy for the 1990s' *MLR* [1988] 493 ; Pitt 'Restrictive Trade Practices - Problems and Practice' *BLR* [1985] 291 ; Green *Commercial Agreements and Competition Law : Practice and Procedure in the UK and EEC* Graham and Trotman (1986) Chs 1-5 ; Swann, O'Brien, Maunders and Howe *Competition in British Industry* Unwin (1974) ; Merkin and Williams *Antitrust Policy in the United Kingdom and the EEC* Sweet and Maxwell (1984). Unless otherwise stated, all statutory references in this appendix refer to the RTPA. The effect of the Deregulation and Contracting Out Act 1994 (hereafter referred to as the Deregulation Act) on the RTPA will be discussed later under the 'Prosecution' stage.

19 S.1 RTPA.

20 Eg Exclusive dealing and resale price maintenance, though such conduct is caught by other legislation. See Whish *Competition Law* Ch5.

21 S.1(1). Each category is individually defined, see ss. 6, 11, 7 and 12 respectively.

22 This leads to the crossover problem which will be discussed later at the 'Prosecution' stage.

23 Most of the comments made here are equally applicable to the other categories of agreements. Thus, it is not intended to discuss specifically ss.7, 11 and 12 in further depth. Further information may be obtained from Whish *Competition Law* Ch5 ; Green *Commercial Agreements and Competition Law* Chs 1-5 ; Agnew *Competition Law* Ch7.

24 For a more detailed discussion of s.6, see Whish *Competition Law* at p 126 et seq ; Green *Commercial Agreements and Competition Law* at pp 4-11 ; Agnew *Competition Law* at p 112 et seq.

25 See s.43(1) and *Re Austin Motor Car Ltd's Agreements* [1958] Ch 61 LR 1 RP 6 ; *Re British Basic Slag Ltd's Agreement* [1962] 3 All ER 247 and *Re Mileage Conference Group of Tyre Manufacturers' Conference Ltd's Agreement* [1966] 2 All Er 849, all of which discuss the ambit of an agreement under the RTPA. For further discussion, see Cunningham *The Fair Trading Act*

1973 Sweet and Maxwell (1973), who criticises the definition of arrangement as vague and asserts that industry is entitled to an unambiguous definition of what constitutes a registrable agreement. Also assessed by Stevens 'The Duke, The Intentional Arousing of Expectations in Others and the Registrar of Restrictive Trading Agreemeents' *MLR* [1963] 547.

[26] It is important to note here that, unlike Art.85, there is no reference in the RTPA as to whether competition is restricted. It is restraints on *conduct* not competition which govern registrability under s.6. This point is assessed further by Whish *Competition Law* at p 132 ; Green *Commercial Agreements and Competition Law* at pp 14-16 and Pitt 'Restrictive Trade Practices'.

[27] See s.43(1). Black in 'Competition and Negative Obligations' *ECLR* [1993] 53 and Pitt 'Restrictive Trade Practices', both discuss the problems and issues involved.

[28] See *Re Cadbury Schweppes Ltd's Agreement* [1975] 2 All ER 307, where the Court refused to imply a restriction, and *Re Ravenseft Properties Application* [1978] QB 52. Both of these cases are discussed by Whish *Competition Law* at pp 132-135.

[29] In common with other competition legislation, s.43(2) treats companies within the same group as one company, thus any agreement between them would not be registrable. Arrangements excluded from RTPA control may be investigated in the UK under the Fair Trading Act 1973 and the Competition Act 1980 and, of course, Arts.85 and 86 of the Treaty.

[30] For a more detailed analysis of the problems raised by these subsections, see Lever 'Bipartite Agreements and the Restrictive Trade Practices Acts 1956 and 1968' *LQR* [1969] 177 and Whish *Competition Law* at pp 142-146.

[31] To be exempted, the agreement must fall entirely within the provisions of a given exeception. Such exempted agreements include those relating to patents and trade-marks and to exclusive dealing. Further exemptions are contained in ss.29-34, but are not discussed here. For further information see Korah *Competition Law* (1982a) at p 129 et seq and Whish *Competition Law* at pp 146-149. The Deregulation and Contracting Out Act 1994 also allows the Secretary of State to exempt "minor" agreements from registration. This Act is discussed by Hutchings 'Deregulation Inititative - Spotlight on UK Competition Law' *ECLR* [1994] R129 and C.Miller 'A Change for the Better ?' *NLJ* [1994] 790.

[32] The OFT was established under the Fair Trading Act 1973. The DG has a wide brief and is also concerned with matters such as consumer protection. Agnew *Competition Law* at pp 14-15 and Whish *Competition Law* at pp 21-22, outline the range of activites undertaken by the OFT.

[33] See Fair Trading Act 1973 and Competition Act 1980. Notably, in relation to mergers, the DG may only proffer advice. Of course, the Minister normally accepts this advice. O'Brien in 'The Silent Revolution' provides an extremely interesting discussion of the DG's increasing discretion. It should be noted that the long awaited reform of UK competition rules would further enhance the DG's discretion. See recent Green and White Papers on the subject : *Review of Restrictive Trade Practices Policy* (Cm 331) HMSO (19880 ; *Opening Markets : New Policy on Restrictive Trade Practices* (Cm 727) HMSO (1989) ; *Abuse of Market Power* (Cm 2100) HMSO (1992). The proposed reforms have generated considerable literature. See eg Burke Gaffney 'Restrictive Trade Practices Policy' *LSG* [1988] 23, 25-26 ; Carlisle 'UK Competition Law : A Case for Radical Review' *BLR* [1987] 24 ; Groves 'Restrictive Practices : The Green Paper' *BLR* [1988b] 161 ; Pratt 'Changes in UK Competition Law' ; Singleton 'The White Paper : Will It Make You Blush Red?' *SJ* [1989] 1354.

[34] This aspect is discussed further by O'Brien 'The Silent Revolution' ; Borrie 'Retrospect and Prospect' ; Whish *Competition Law* at pp 21-22 ; Agnew *Competition Law* at pp 14-15.

[35] The DG is a member of the EC's Advisory Committee on Restrictive Practices and Monopolies.

[36] Now constituted under the Restrictive Practices Court Act 1976.

[37] The Court consists of Three High Court judges, one judge of the Court of Session, one judge of the Supreme Court of N. Ireland and up to ten lay members appointed by the Lord Chancellor and noted for their knowledge and experience in commerce and industry.

[38] Unlike MMC Reports, the decisions of the RPC are binding on all parties. Issues of appeal from the RPC will be discussed later in the context of defence rights at 'Trial' stage. For further discussion of the RPC, see Whish *Competition Law* at pp 121-124 ; Stevens and Yamey *The*

Restrictive Practices Court : A Study of the Judicial Process and Economic Policy Wiedenfeld and Nicolson (1965)

39 Given the centrality of the Secretary of State in enforcement, Whish *Competition Law* at p 24, has criticised the frequent changes in the incumbency, noting that between May 1979 - January 1993 there were 11 holders of this post.

40 Exemption occurs under s.29. The DG's activities under s.21(2) will be evaluated later in the context of informal resolutions.

41 Private litigation, whilst possible, is much less common than in the US. The 1989 White Paper, *Opening Markets : New Policy on Restrictive Trade Practices* (Cm 727) HMSO (1989) at paras 5.15 - 5.19, envisages greater use of this avenue of redress.

42 Background information on this section is derived from : Whish *Competition Law* Ch5 ; Agnew *Competition Law* Ch7 ; Korah *Competition Law* (1982a) Ch6 ; Pitt 'Restrictive Trade Practices' ; Pratt 'Changes in UK Competition Law' ; Hutchings 'Deregulation Inititative' ; Walker-Smith 'Collusion : Its Detection and Investigation' *ECLR* [1991] 71 ; Robertson 'Enforcement of the UK RTPA Legislation : Limitations and Legislative Proposals' *ECLR* [1992] 82 ; Joshua 'The Element of Surprise : EEC Competition Investigations under Art.14(3) of Reg.17' *ELR* [1983] 3 ; Joshua 'Information in EEC Competition Law Procedures' *ELR* [1986] 409 ; Joshua 'Proof in Contested EEC Competition Cases : A Comparison with the Rules of Evidence in Common Law' *ELR* [1987] 315 ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO

43 See ss.1(1),(2) and S.24. Ss.2 and 24 detail which particulars must be provided and the relevant time limits. the Deregulation Act 1994 relaxes these time limits. See Hutchings 'Deregulation Inititative'. Pratt 'Changes in UK Competition Law' at p 91, criticises this change as reducing the deterrent value of the law.

44 *Opening Markets : New Policy on Restrictive Trade Practices* (Cm 727) HMSO (1989) Ch4. Livingstone and Sherliker 'Confidentiality in UK and EEC Antitrust Procedures *JBL* [1982] 31, also criticise this public right of inspection.

45 S.23(2). Also, under the Deregulation Act, parties may request for particulars of an agreement to be kept on the confidential section of the register where publication would "substantially damage the legitimate business interests of any person" For further examination, see C.Miller 'A Change for the Better ?' ; Hutchings 'Deregulation Inititative'.

46 These problems are discussed further by Whish *Competition Law* at pp 156-157.

47 Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at pp 46-47 ; Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at pp 38-41. Only 686 of the agreements submitted in 1993 were actually added to the register. The total number of registered agreements now stands at over 11,000. See Table 1 infra for additional statistical details.

48 See s.35(1)(d). A number of firms have relied on the sanction of voidness as a defence against breach of contract actions, eg *Topliss Showers v Gessey and Sons Ltd* [1982] ICR 504 ; *Snushalls Team Ltd v Marcus* (unreported judgement of 21 March 1990).

49 Though the DG may be prepared to consider an application under s.21(2).

50 S.35(3). The first such order was made in *Re Flushing Cistern Makers Ltd's Agreement* [1973] 3 All ER 817. For additional discussion of these orders, see Pitt 'Restrictive Trade Practices' and Whish *Competition Law* at pp 172-173.

51 However, there have been out of court settlements, eg the Post Office accepted £9m. from the producers of wires and cables. See Home Office *DG/OFT Annual Report 1979* HC Papers 1979/80 (224) HMSO at p 37. Increasing awareness of competition law may result in more actions being brought.

52 S.36 and s.37 respectively. The Court may also order the production of documents. Failure to comply with the Court's order under s.37 is punishable as contempt of court.

[53] Under s.38, a failure to comply with a s.36 notice may be subject to a fine. Where false information is provided or documents are altered/destroyed, a fine or a custodial sentence or both may be imposed. S.38(4) allows the imposition of daily fines after a conviction until the documents are properly furnished. For further, see Green *Commercial Agreements and Competition Law* at pp 156-157.

[54] See discussion by House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at pp xxxiii-xl, who contrast the search powers available in other related areas of UK enforcement. Korah *Competition Law* (1982a) Ch6 ; Whish *Competition Law* Ch5 ; Walker-Smith 'Collusion' ; Robertson 'Enforcement of the UK RTPA Legislation' ; Pratt 'Changes in UK Competition Law' ; Pitt 'Restrictive Trade Practices', all discuss the fact-finding powers of the DG. Walker-Smith provides an interesting account of the conduct of several recent investigations into glass, fuel oil and ready mixed concrete cartels.

[55] Walker-Smith 'Collusion' at pp 72-73. At p 77, he explains that the OFT now also use computer programs to analyse price information etc. to detect the existence of covert cartels.

[56] Eg many relate to an assessment of entry barriers and demand and cost conditions.

[57] In 1986, 1988 and 1990 ; 55, 97 and 72 such notices were issued respectively. See Home Office *DG/OFT Annual Report 1986* HC Papers 1987/88 (6) HMSO ; Home Office *DG/OFT Annual Report 1988* HC Papers 1988/89 (440) HMSO ; Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO. Table 1 infra also provides statistical details of the DG's enforcement activities.

[58] Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at p 40. A similar situation existed in 1992, where out of 50 new investigations, only 15 s.36 notices were sent ; Home Office *DG/OFT Annual Report 1992* HC Papers 1992/93 (719) HMSO at p 32. Both reports indicate that a number of 'polite inquiries' have been sent. However, precise figures are not supplied.

[59] Cross-examination was ordered in *Registrar of Restrictive Trading Agreements v W.H.Smith & Son* (1969) LR 7 RP 122. Walker-Smith, an OFT official, states in 'Collusion' at p 72, that the s.38 power has never been used. But, Green in *Commercial Agreements and Competition Law* at p 157, notes that in *DPP v Automatic Telephone & Electric Co* (1968) 112 SJ 109, two firms were fined under s.38 for suppressing onformation when registering their agreements.

[60] In 1980, 681 complaints were received. The figures for 1987 and 1993 were 1,122 and 1,577 respectively. These figures represent the total number of complaints received by the OFT on all competition matters ; see Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at pp 46-47 ; Home Office *DG/OFT Annual Report 1987* HC Papers 1987/88 (544) HMSO at pp 30-34 ; Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at pp 38-41.

[61] See *Registrar of Restrictive Trading Agreements v W.H.Smith & Son* (1969) LR 7 RP 122. The Court made it clear that suspicions of a general belief in the industry that cartel exists are insufficient. Usually, before a s.36 notice can be issued the DG must know the names of some of the parties and have clear idea of how the cartel operates. See discussion by Walker-Smith 'Collusion' ; Robertson 'Enforcement of the UK RTPA Legislation'.

[62] See Home Office *DG/OFT Annual Report 1988* HC Papers 1988/89 (440) HMSO at pp 37-38 ; Walker-Smith 'Collusion' at pp 74-75, who discusses recent OFT investigations into glass, cement and fuel oil cartels.

[63] In his 1986 Report Home Office *DG/OFT Annual Report 1986* HC Papers 1987/88 (6) HMSO at p 13 the DG remarked that it was a "Gilbertian absurdity" that he should be required to produce evidence of the existence of a cartel before he can issue a notice to discover whether a cartel exists. See also comments by Whish *Competition Law* at pp 171-172 ; Robertson 'Enforcement of the UK RTPA Legislation' ; Walker-Smith 'Collusion' ; Pitt 'Restrictive Trade Practices'. Moreover, this strict objective test under s.36 may be contrasted with the subjectiveness of the DG's investigation powers in relation to a monopoly reference. See s.44(1)(b) Fair Trading Act 1973.

[64] See Robertson 'Enforcement of the UK RTPA Legislation' at p 85.

65 For background to this section, see : Kerse *EEC Antitrust Procedure* (3rd Edn) Sweet and Maxwell (1994) ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO ; Joshua 'The Element of Surprise' ; Joshua 'Proof in Contested EEC Competition Cases' ; Philip 'EEC Competition Law and Privilege Against Self Incrimination in English Law' *LIEI* [1981] 49 ; Van Overbeek 'The Right to Remain Silent in Competition Investigations : The Funke Decision of the ECHR Makes Revision of the ECJ's Caselaw Necessary' *ECLR* [1994] 127 ; Livingstone and Sherliker 'Confidentiality'.

66 S.14(1) Civil Evidence Act 1968 provides that the privilege only applies only "as regards criminal offences under the law of any part of the United Kingdom and penalties provided for by such law". See also *AT&T and Others* [1992] 3 All ER 523, which examines the scope of this protection in English civil proceedings. Joshua 'The Element of Surprise' ; Joshua 'Information in EEC Competition Law Procedures' ; Kerse *EEC Antitrust Procedure* at para 3.44, both consider the ambit of this safeguard in competition and other UK regulatory proceedings.

67 Further details may be obtained from : Joshua 'The Element of Surprise' at pp 13-15 ; Joshua 'Proof in Contested EEC Competition Cases' at pp 336-340 ; Kerse *EEC Antitrust Procedure* at para 3.44 ; House of Lords Select Committee on the European Communities *18th Report, Commission Powers of Investigation and Inspection* HL Papers 1983/84 (220) HMSO at p xxxv. Examples of restrictions on this privilege in other areas of regulation include : *Bishopgate Investment v Maxwell* [1992] 2 All ER 856 (Insolvency Act 1986) ; *In re London Investments plc* 17 January 1992 (Companies Act 1985) ; *Bank of England v Riley and Another* [1992] 1 All ER 769 (Banking Act 1987). For the situation regarding self incrimination before UK courts in the context of Art.85, see *RTZ Corp v Westinghouse Elec Corp* [1978] 1 All ER 434 HL. This case is assessed in depth in Philip 'EEC Competition Law and Privilege Against Self Incrimination in English Law'.

68 S.38 allows the imposition of a fine for a refusal to supply information. Supplying false information or destroying documents are both criminal offences and may be punished by a fine or imprisonment or both. For further, see Green *Commercial Agreements and Competition Law* at pp 156-157.

69 In particular, this protection would cover communications between lawyers and third parties. The scope of legal professional privilege in English law is discussed by Murphy in *A Practical Approach to Evidence* Blackstone Press (1980) Ch11 and, in the context of competition regulation, by Joshua in both 'The Element of Surprise'at pp 15-17 and 'Proof in Contested EEC Competition Cases' at pp 340-345.

70 See *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No.2)* [1974] AC 405.

71 Walker-Smith 'Collusion' at p 71.

72 A similar belief has long pervaded English contract law.

73 Under s.1(2)(c).

74 S.21(2) will be discussed later in detail in the context of informal resolutions. The other provisions of s.21 permit non-reference to the Court where the agreement has been terminated under s21(1)(b)(i), and where the restriction has been removed, under s.21(1)(b)(ii). Further details of all aspects of s.21 may be obtained from Whish *Competition Law* at pp 158-161 ; Green *Commercial Agreements and Competition Law* at p 157 et seq.

75 The OFT has published several booklets outlining its approach to competition enforcement. See eg *An Outline of UK Competition Policy : Restrictive Trade Practices : Provisions of the Restrictive Trade Practices Act 1976* ; *Cartels : Detection and Remedies - A Guide for Local Authorities* ; *Restrictive Trade Practices in the Bus Industry.*

76 The defects of the present system and the prospect of reform have been the only areas to attract critical commentary. See eg Pitt 'Restrictive Trade Practices' ; Pratt 'Changes in UK Competition Law' ; D.Jacobs 'Competition Law' ; Robertson 'Enforcement of the UK RTPA Legislation' ; Frazer 'Defects and Effects' ; Burke Gaffney 'Restrictive Trade Practices Policy' ; Carlisle 'UK Competition Law' ; Groves 'Restrictive Practices' [1988b] ; Singleton 'The White Paper'.

77 Here Merkin 'The Future of Restrictive Trade Practices Policy' *JBL* [1988] 338, points out that part of the problem is that the statute contains too many exceptions.

78 Equally, an agreement may satisfy several sections and so be registrable under each.

79 The Leisner Report *A Review of Restrictive Trade Practices Policy* (Cmnd 7512) HMSO (1979), noted the frequency with which this occurred and suggested that the matter should be investigated. So far, no action has been taken, though proposed reforms would eliminate the problem. Pitt 'Restrictive Trade Practices' at p 291, notes that the converse also occurs with competitively harmless agreements being enforced against.

80 This problem is discussed particularly by O'Brien 'The Silent Revolution' at p 237 and Pratt 'Changes in UK Competition Law' at p 91.

81 See discussion supra regarding the legislative outline of the RTPA. Also, Green *Commercial Agreements and Competition Law* Ch1 ; Whish *Competition Law* Ch5.

82 Singleton 'The White Paper'; D.Jacobs 'Competition Law' ; Pitt 'Restrictive Trade Practices' ; Lever 'UK Economic Regulation : Use and Abuse of the Law' *ECLR* [1992] 55, all address these issues. Singleton particularly, notes that many businesses and lawyers are totally unaware of the existence of RTPA legislation.

83 See Lever 'UK Economic Regulation', who discusses the problems of economic regulation by legal means, particularly courts, and concludes that administrative bodies are more effective. In contrast, Burke Gaffney 'Restrictive Trade Practices Policy', is critical of reform proposals which take decision-making out of the Court's hands and place it at the discretion of a monolithic administrative authority. See also Singleton 'The White Paper'.

84 See D.Jacobs 'Competition Law' at p 132 ; Swann, O'Brien, Maunders and Howe *Competition in British Industry* at pp 80-82, who explain that the routine adversarial tactics of "intimidation and bullying" of witnesses reported by businessmen following their court experiences under the RTPA, have produced a disaffection with court-based enforcement.

85 These political and pragmatic policy goals are also discussed supra under 'Goals and Guidance'.

86 Pres. Carter has described this appproach as one of "benign neglect", UK civil servants prefer to term it "masterly inactivity". On this, see de Metz 'Anglo - Saxon Attitudes - How to deal with EEC Directives' *BLR* [1990] 313 at p 313, for an interesting account of the UK approach. Whilst an absence of enforcement activity is certainly true of RTPA legislation, there is substantially more enthusiasm and action regarding the regulation of privatised utilities. For further discussion of this regulation, see Whish *Competition Law* Ch10.

87 See O'Brien 'The Silent Revolution' at p 218. D.Jacobs 'Competition Law' and Borrie 'Retrospect and Prospect', agree that the formalism of the RTPA has encouraged pragmatic solutions.

88 See O'Brien 'The Silent Revolution' at pp 224-231. In particular, the Fair Trading Act 1973 and the Competition Act 1980 have empowered the DG. Also discussed by Cook 'Competition Policy - The End of an Era?' *In House Lawyer* [1993] 22.

89 Informal resolutions under s.21(2) will be discussed in greater detail later in this appendix.

90 Greater lee-way has also been provided in respect of time limits for registration and regarding placement of the agreement on the public section of the register.

91 Deregulation is discussed by both Hutchings 'Deregulation Inititative' and C.Miller 'A Change for the Better ?'.

92 Cook in 'Competition Policy', discusses the increasingly pragmatic nature of UK competition enforcement in general and the use of competition rules as political tools, noting that this has enhanced the importance of the OFT's role. These influences are equally evident in other areas of UK enforcement. In relation to the Monopolies and Mergers Commission, Pass and Sparks 'Dominant Firms and the Public Interest : A Survey of MMC Reports' *Antitrust Bulletin* [1980] 437, note its highly discretionary and pragmatic approach.

93 See Green *Commercial Agreements and Competition Law* at p 157. For instance, in 1993, 686 agreements were added to the register. In contrast to the two cases heard that year by the RPC, 711 cases were settled under s.21(2). See Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at pp 39-40 for further details.

94 For background information, see : Agnew *Competition Law* at pp 123-124 ; Green *Commercial Agreements and Competition Law* at pp 157-176 ; Whish *Competition Law* at pp 158-161 ; Korah *Competition Law* (1982a) at pp 130-132 ; Borrie 'Competition Policy in Britain : Big Bangs and Lesser Detonatations' *JBL* [1986] 358.

95 S.21(2).

96 Borrie 'Big Bangs and Lesser Detonatations' and Green *Commercial Agreements and Competition Law* at pp 157-176, explain in detail the s.21(2) resolution process.

97 Home Office *DG/OFT Annual Report 1979* HC Papers 1979/80 (224) HMSO at p 44. These criteria have been reiterated on several occasions. See eg Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at pp 50-51 ; Home Office *DG/OFT Annual Report 1986* HC Papers 1987/88 (6) HMSO at p 29. See also comments by Borrie, a former DG, in 'Big Bangs and Lesser Detonatations'.

98 See Green *Commercial Agreements and Competition Law* at pp 164-166, cf Whish *Competition Law* at p 160 and Borrie 'Big Bangs and Lesser Detonatations' at p 368. The OFT's comments in the 1975 Report clearly envisage some assessment of the public interest, Home Office *DG/OFT Annual Report 1975* HC Papers 1975/76 (35) HMSO.

99 See particularly, Home Office *DG/OFT Annual Report 1989* HC Papers 1989/90 (502) HMSO, which deals in depth with the nexus between competition policy and consumer protection.

100 This point is made in Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at p 50. See also, Green *Commercial Agreements and Competition Law* at p 166 ; Borrie 'Big Bangs and Lesser Detonatations'.

101 This point was highlighted in Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at p 50. Discussed by Whish *Competition Law* at p 159 and Green *Commercial Agreements and Competition Law* at p 166. Thus, price-fixing would rarely be the subject of a s.21(2) direction, but may well fall outside Art.85(1) on de minimis grounds.

102 Codes of practice, group buying and the sale of businesses are also likely to receive directions. Conversely, the 1980 Report notes that price-fixing, market sharing and collusive tendering are rarely suitable for s.21(2) directions. See discussion in Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at pp 50-52 and Borrie 'Big Bangs and Lesser Detonatations' at p 367.

103 The factors covered are detailed by Green in *Commercial Agreements and Competition Law* at p 173.

104 See Green *Commercial Agreements and Competition Law* at p 174, who notes that the Minister may confer with other goverment departments, particularly the Treasury, before coming to a decision.

105 Under s.21(3). This has never been done, see Whish *Competition Law* at p 161.

106 Home Office *DG/OFT Annual Report 1987* HC Papers 1987/88 (544) HMSO at p 31 acknowledged that "most agreements are dealt with in this way". See also, Whish *Competition Law* at p 159 and Green *Commercial Agreements and Competition Law* at p 157, who both assess the importance of s.21(2) directions. Statistics reveal the provision's increasing value. In 1980, 38 goods/service agreements were dealt with under s.21(2). By 1990, the figure had risen to 467 agreements. In 1993, 711 arrangements were the subject of s.21(2) directions. See Home Office *DG/OFT Annual Report 1980* HC Papers 1980/81 (354) HMSO at pp 46-47 ; Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO at p 39-40 ; Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at pp 38-41. See also Table 1 infra for further statistical data.

[107] In total, of the 11,194 agreements placed on the register by the end of 1993, 4,598 were dealt with under s.21(2). Information derived from *DG/OFT Annual Reports.* See also Table 1 infra for further statistical data.

[108] Additional details of these agreements may be found in Home Office *DG/OFT Annual Report 1984* HC Papers 1984/85 (327) HMSO at p 33 ; Home Office *DG/OFT Annual Report 1987* HC Papers 1987/88 (544) HMSO at p 31.

[109] See Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO at pp 39-41, where, following negotiation and modification of the arrangement, the DG is currently assessing the agreement in operation before taking further action.

[110] Green *Commercial Agreements and Competition Law* at p 157 et seq discusses these provisions in depth.

[111] See *Milk Retailers.* For details of the case and the undertakings given, see Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at p 41. The 1982 Report, Home Office *DG/OFT Annual Report 1982* HC Papers 1983/84 (20) HMSO at p 34, outlines assurances given by the Scottish Milk Marketing Board regarding its pricing policy and by Wadham Stringer Ltd in connection with a refusal to supply a trader. Also, Home Office *DG/OFT Annual Report 1983* HC Papers 1983/84 (495) HMSO at p 34, gives details of undertakings given in connection with Boosey Hawkes plc's franchising agreement. Both reports give information on other non-statutory undertakings.

[112] Whish *Competition Law* at pp 159-160. *DG/OFT Annual Reports* rarely provide precise details of s.21(2) directions. Where they do, they amount to no more than a short paragraph outlining the agreement. Little or no reasoning is provided. The ambiguity surrounding s.21(2) is admitted by a former DG. See Borrie 'Big Bangs and Lesser Detonatations' at p 367 at p 368.

[113] Borrie 'Big Bangs and Lesser Detonatations' at p 367 at pp 358, 362, discusses these problems. He notes that this uncertainty causes considerable difficulties for businesses who need a quick and clear response from the OFT in order to protect their commercial interests.

[114] Whish *Competition Law* at p 159.

[115] This point is noted, though not criticised by Green in *Commercial Agreements and Competition Law* at p 174.

[116] Background information on this section is derived from : Green *Commercial Agreements and Competition Law* ; Borrie 'Big Bangs and Lesser Detonatations' at p 367 ; Cook 'Competition Policy' ; Joshua 'Proof in Contested EEC Competition Cases' ; Hornsby 'Judicial Review of Decisions of the UK Competition Authorities : Is the Applicant Bound to Fail?' *ECLR* [1993] 183.

[117] RSC Order 24 and CCR Order 14. For further discussion of this procedure, see O'Hare and Hill *Civil Litigation* Longman (1986) ; Cowsill and Clegg *Evidence : Law and Practice* Longman (1987).

[118] This will include both deliberations regarding individual cases and considerations of broader policy. This immunity is discussed more thoroughly by Murphy *A Practical Approach to Evidence* Ch11 ; Cowsill and Clegg *Evidence : Law and Practice* Ch6. Joshua 'Proof in Contested EEC Competition Cases' at pp 348-350, discusses the privilege in the competition context.

[119] See *Air Canada v Secretary of State for Trade* [1983] 1 All ER 910 (HL).

[120] The difficulties here have already been discussed above. See also, Livingstone and Sherliker 'Confidentiality', for further details.

[121] The Deregulation Act makes it easier to have information witheld on grounds of confidentiality. In addititon, the common law offers some protection of confidential information. For further discussion of this aspect, see Joshua 'Balancing the Public Interest : Confidentiality, Trade Secrets and Disclosure of Evidence in EC Competition Procedure' *ECLR* [1994] 68 and Coleman *The Legal Protection of Trade Secrets* Sweet and Maxwell (1992) Ch2.

122 This is true of informal investigations by the OFT and presumbly applies to their other informal processes. See *Maxwell v DTI* [1974] QB 523 (CA), discussed by Green *Commercial Agreements and Competition Law* at p 224.

123 See Green *Commercial Agreements and Competition Law* at pp 173-174.

124 Though the Minister could be questioned in the House of Commons on the exercise of his powers. See discussion in Korah *Competition Law* (1982a) at p 21.

125 See s.21(3).

126 Green in *Commercial Agreements and Competition Law* at p 174, suggests that the Secretary of State may only withdraw a direction where the change in circumstances has affected an essential part of the reasoning which led him to grant the initial direction.

127 This tactic has been openly acknowledged by the OFT, see Home Office *DG/OFT Annual Report 1979* HC Papers 1979/80 (354) HMSO at p 47 ; Green *Commercial Agreements and Competition Law* at pp 175-176 ; Whish *Competition Law* at p 161.

128 Either for common law restraint or one of the economic torts. See discussion in Whish *Competition Law* Ch2 ; Winfield and Jolowicz on Tort (14th Edn) Sweet and Maxwell (1994) Ch18 ; Terry 'Unfair Competition and the Misappropriation of a Competetitor's Trade Values' *MLR* [1988] 296 ; Rutherford 'Restraint of Trade - The Public Interest' *MLR* [1972] 651.

129 Under Order 53 RSC and s.31 Supreme Court Act 1981. The grounds for judicial review are discussed in depth by Wade *Administrative Law* (5th Edn) Oxford Unv. Press (1982). See also, Green *Commercial Agreements and Competition Law* at pp 222-226 and Hornsby 'Judicial Review', who discuss review of competition issues.

130 Hornsby in 'Judicial Review' at pp 184-186, discusses the high burden faced by appellants in demonstrating that the authority's procedures were "manifestly unfair" and notes that even if they succeed in discharging this burden, there is no guarantee that the decision will be overturned completely. See also, Green *Commercial Agreements and Competition Law* at pp 223-225.

131 See particularly, *R v MMC ex parte Argyll Group* [1986] 2 All ER 257 at p 266, where the MR made it clear that the courts were more concerned with the substance rather than the form of the authority's actions. He also stressed the need for speed and finality of decision-making.

132 No cases have applied for review of ss.21(2),(3). Only one recent case has succeeded in review of a competition authority's decision. See *R v DG/OFT ex parte Southdown Motor Services Ltd* (not yet reported). This case is discussed by Hornsby 'Judicial Review' at p 188, who is particularly critical of the inadequacies of judicial review of competition issues. He has urged a change in attitude in order to protect firms from the OFT's increasingly monolithic discretionary powers. See similar comments by Cook in 'Competition Policy'.

133 As yet, the precise approach of the recently elected Labour goverment to competition issues is unclear.

134 Fox 'Antitrust in its Second Century : The Phoenix Rises from the Ashes' *Antitrust Bulletin* [1986c] 383 at p 392.

135 For background to this section, see : Whish *Competition Law* Ch5 ; Agnew *Competition Law* Ch7 ; Korah *Competition Law* (1982a) Ch5 ; Pratt 'Changes in UK Competition Law' ; O'Brien 'The Silent Revolution' ; Lever 'UK Economic Regulation' ; Pitt 'Restrictive Trade Practices' ; Frazer 'Defects and Effects'; D.Jacobs 'Competition Law'.

136 As already discussed, less than 1% of agreements are referred to the RPC.

137 S.10 and s.19 RTPA which provides similar gateways for service agreements. See Whish *Competition Law* Ch5 for text and discussion of s.10.

138 Eg ss.10(1)(b) and (c). The scope and application of these gateways are dealt with in much greater detail in Green *Commercial Agreements and Competition Law* Ch5 ; Korah *Competition Law* (1982a) Ch7 ; Whish *Competition Law* Ch5.

139 Less than 1% of cases go before the Court. Since 1956, only 11 agreements have successfully passed through one of the s.10 gateways. The last successful case was in 1965, see

Re Distant Water Vessels Development Scheme [1966] 3 All ER 897 (RPC). This aspect is discussed by Whish *Competition Law* at p 161 and Green *Commercial Agreements and Competition Law* at p 157.

140 For instance Home Office *DG/OFT Annual Report 1988* HC Papers 1988/89 (440) HMSO at p 38, outlines a number of price-fixing and collusive tendering agreements by manufacturers of polyester resin, iron and steel operators and estate agents. None was defended and the RPC found all agreements against the public interest. These problems are assessed by Pratt 'Changes in UK Competition Law' at p 91 ; O'Brien 'The Silent Revolution' at p 233 ; Frazer 'Defects and Effects' at p 494 ; Pitt 'Restrictive Trade Practices' at p 294.

141 Eg gateways ss.10(1)(a) and (c). Many other gateways have been pleaded successfully only once, eg s.10(1)(d) in *Re Sulphuric Acid* (1966) LR 6 RP 210, RPC ; s.10(1)(e) in *Yarn Spinners* [1959] 2 All ER 1, RPC ; s.10(1)(f) in *Re Water Tube Biolermakers' Agreement* [1959] 3 All ER 257, RPC. Discussed by Green *Commercial Agreements and Competition Law* at pp 185-201 ; Whish *Competition Law* at pp 162-165, who both highlight the problems of the gateways.

142 Under s.10(1)(b), the parties must prove that the agreement provides specific and substantial benefit to purchasers, consumers and users. Green *Commercial Agreements and Competition Law* at p 186 and Korah *Competition Law* (1982a) at pp 162-163, note that much of the problem stems from the Court's qualitative interpretation of the words "specific" and "substantial". See also criticism by D.Jacobs 'Competition Law' at p 132.

143 Eg S.10(1)(c). Economists have been extremely critical of cases such as *Yarn Spinners*, where economic and political considerations conflicted directly. See also, *Re Black Bolt and Nut Association's Agreement* [1960] 3 All ER 122, RPC. See also discussion in Stevens and Yamey *The Restrictive Practices Court* Chs 4, 5 which assesses the RPC's approach to economic evaluation.

144 *Yarn Spinners* failed the 'balancing tailpiece'. For detailed discussion of the justiciability aspect, see Stevens and Yamey *The Restrictive Practices Court* ; Hunter *Competition and the Law* (1966) ; Cunningham *The Fair Trading Act 1973* ; Lord Kilmuir *Political Adventure* (1964) at pp 261-263, where he discusses his problems as Lord Chancellor in overcoming judges' anxiety at their becoming involved in complex economic problems. For more recent criticism, see Lever 'UK Economic Regulation' ; D.Jacobs 'Competition Law'.

145 O'Brien 'The Silent Revolution' at p 233 ; D.Jacobs 'Competition Law' at p 132 ; Swann, O'Brien, Maunders and Howe *Competition in British Industry* at pp 80-82, deal with this.

146 Lever 'UK Economic Regulation' at p 58, where he insists that if tha burden had been reversed, the opposite result would have been reached.

147 Stevens and Yamey *The Restrictive Practices Court* and Lever 'UK Economic Regulation', have been particularly condemning.

148 See especially, discussion by Frazer 'Defects and Effects'; Carlisle 'UK Competition Law' ; Pitt 'Restrictive Trade Practices' ; Pratt 'Changes in UK Competition Law'.

149 Recent referrals include *Offshore Supply Vessel Operators* Home Office *DG/OFT Annual Report 1988* HC Papers 1988/89 (440) HMSO at p 38 ; *Glass Manufacturing and Distribution* and *Steel Reinforcing Bars* Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO at pp 41-41, 111-112 ; *Bus Operators in Leicestershire, North Eastern Fuel Oil Cartel* and *Steel Roof Purlins* *DG/OFT Annual Report 1990* ibid at pp 39-40. On-going investigations include grounds maintenance, sugar, concrete and newsagents, see Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at p 40-41. O'Brien 'The Silent Revolution' at p 233 ; Pratt 'Changes in UK Competition Law' at p 91 ; Frazer 'Defects and Effects' at p 494, all discuss the problems of non-compliance.

150 See Table 1 infra for statistics of the number of cases dealt with by the RPC in recent years. Also comments by O'Brien 'The Silent Revolution' ; Frazer 'Defects and Effects'.

151 The scope and application of sanctioning powers is discussed further by : Green *Commercial Agreements and Competition Law* Ch5 ; Korah *Competition Law* (1982a) Ch6 ; Whish *Competition Law* Ch5.

152 S.2(2). Eg *Re ABTA's Agreement* [1984] ICR 12, RPC, where the Court struck down restrictions which inhibited the emergence of new competition, though other restraints were found to be in the public interest. Conversely, where an agreement passes through s.10, the RPC may make a declaration to that effect.

153 The RTPA does not deal specifically with this issue. For further on severance, see *Chitty on Contracts* (26th Edn) Sweet and Maxwell (1989) at paras 1281-1292.

154 See s.2(2)(a)-(c).

155 Green *Commercial Agreements and Competition Law* at p 180, asserts that this difficulty is the result of insufficiently detailed reasoning in original judgements, particularly in relation to the public interest assessment. This is exacerbated by the number of undefended agreements where no analysis of the restriction occurs. See also Whish *Competition Law* at p 166.

156 See comments by Megaw J. in *Re Mileage Conference Group* [1966] 2 All ER 849, RPC.

157 See *Re Mileage Conference Group* [1966] 2 All ER 849, RPC ; *Re British Concrete Pipe Association's Agreement* [1982] ICR 182, RPC.

158 Ss.25 and 26 Competition Act 1980. These powers are discussed more fully by Green *Commercial Agreements and Competition Law* at pp 182-183 ; Whish *Competition Law* at pp 169-170. The power of suspension was employed in *Re ABTA's Agreement* [1984] ICR 12, RPC and [1985] ICR 122, RPC.

159 Under s.3 RTPA.

160 This power has only been used successfully on one occasion in the recent case of *Re Institute of Independent Insurance Brokers* [1991] ICR 822, RPC. Bright 'Interim Relief in UK Law' *ECLR* [1992] 21, provides a critical analysis of the s.3 procedure. The threat of s.3 proceedings secured the abandonment of the agreement on football coverage between LWT and the Football League. For further details of this, see Home Office *DG/OFT Annual Report 1979* HC Papers 1979/80 (224) HMSO at p 46.

161 These are incorporated into the RPC's order. Discussed by Green *Commercial Agreements and Competition Law* at p 179 and Whish *Competition Law* at p 166.

162 Eg in *Glass Manufacturing and Distribution, Steel Rebars, Bus Operators in Leicestershire* and *Thermal Insulation*, a mixture of undertakings and court orders were made. See Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO at pp 41-42 ; Home Office *DG/OFT Annual Report 1991* HC Papers 1991/92 (38) HMSO at p 39 ; Home Office *DG/OFT Annual Report 1993* HC Papers 1993/94 (551) HMSO at p 40. Undertakings alone were accepted in *Steel Roof Purlins, North East Fuel Oil Cartel* and *Bus Operators in Plymouth*. See Home Office *DG/OFT Annual Report 1991* HC Papers 1991/92 (38) HMSO at p 39 ; Home Office *DG/OFT Annual Report 1992* HC Papers 1992/93 (719) HMSO at p 32. Further examples may be found in Home Office *DG/OFT Annual Report 1984* HC Papers 1984/85 (3327) HMSO at p 34 and Home Office *DG/OFT Annual Report 1988* HC Papers 1988/89 (440) HMSO at p 38.

163 See Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO at pp 111-112, where fines totalling £81,000 were imposed. See also, *Re Galvanised Tank Manufacurers' Association's Agreement* [1965] 2 All ER 1003, RPC : £102,000 ; *Re Mileage Conference* [1966] 2 All ER 849, RPC : £80,000 ; *Re British Concrete Pipe Association's Agreement* [1982] ICR 421, RPC : £185,000. Breach of an undertaking is also civil contempt. For more extensive discussion of contempt proceedings, see Borrie and Lowe *Contempt of Court* (1983) ; Korah 'Contempt of the Restrictive Practices Court' *LSG* [1980] 961 ; Green *Commercial Agreements and Competition Law* at pp 208-214 ; Whish *Competition Law* at p 168 ; Robertson 'Enforcement of the UK RTPA Legislation'.

164 See *Ready Mixed Concrete* Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO at pp 110-111. This is the first occasion on which action against an individual has been taken. Threats of imprisonment were made in *Re Galvanised Tank Manufacurers' Association's Agreement* [1965] 2 All ER 1003, RPC and *Re British Concrete Pipe Association's Agreement* [1982] ICR 421, RPC as well as *Ready Mixed Concrete*.

165 Employees in *Ready Mixed Concrete* were told that they were fortunate to avoid imprisonment following their contempt. See Home Office *DG/OFT Annual Report 1990* HC Papers 1990/91 (502) HMSO at pp 110-111.

166 [1991] 4 All ER 150, CA. Smith's were part of the *Ready Mixed Concrete* cartel.

167 See *DG/OFT v Pioneer Concrete (UK)* [1994] 3 WLR 1249, HL. The Lords held that the company was liable for the contempt where employees acted deliberately in a way which breached an injunction, even though their actions may be in the face of a direct prohibition and without the company's knowledge. Fines of £81,000, originally imposed by the RPC in *Ready Mixed Concrete [*1991] ICR 52, were restored.

168 The problems that this poses for the OFT are discussed in Home Office *DG/OFT Annual Report 1991* HC Papers 1991/92 (38) HMSO at pp 15-16.

169 Robertson 'Enforcement of the UK RTPA Legislation' at p 82. The DG in Home Office *DG/OFT Annual Report 1991* HC Papers 1991/92 (38) HMSO at p 16, agrees that immediate reform is essential.

170 Eg Robertson 'Enforcement of the UK RTPA Legislation' ; Pitt 'Restrictive Trade Practices' ; Frazer 'Defects and Effects'.

171 See eg Robertson 'Enforcement of the UK RTPA Legislation' at p 86, who asserts that, for the RTPA to be taken seriously, it must be able to exact more from firms than a promise not to do it again.

172 See comments by Swann, O'Brien, Maunders and Howe *Competition in British Industry* ; O'Brien 'The Silent Revolution' ; Pratt 'Changes in UK Competition Law'. For additional discussion of civil litigation procedure and its due process safeguards, see O'Hare and Hill *Civil Litigation.*

173 On this, see Griffith *The Politics of the Judiciary* Fontana (1981).

174 See s.10 Restrictive Practices Court Act 1976. Further apppeal to the House of Lords is possible.

175 Recently, an appeal was lodged in *Re ABTA's Agreement* [1985] ICR 122, RPC.

BIBLIOGRAPHY

List of Abbreviations

Akron LR	Akron Law Review
AJIL	American Journal of International Law
Am Ec Rev	American Economic Review
Antitrust LJ	Antitrust Law Journal
Antitrust L Ec Rev	Antitrust Law and Economics Review
Australian Business LR	Australian Business Law Review
Brit Jo of Criminology	British Journal of Criminology
BLR	Business Law Review
California LR	California Law Review
Columbia LR	Columbia Law Review
CMLR	Common Market Law Review
Cornell LR	Cornell Law Review
Crim LR	Criminal Law Review
Econ Jo	Economics Journal
ECLR	European Competition Law Review
EIPR	European Intellectual Property Review
ELR	European Law Review
Fordham Corp Law Inst	Fordham Corporate Law Institute
Fordham LJ	Fordham Law Journal
Harvard LR	Harvard Law Review
Houston LR	Houston Law Review
Indiana LR	Indiana Law Review
ICLQ	International and Comparative Law Quarterly
Int Jo Law and Society	International Journal of Law and Society
Int Jo of the Sociology of Law	International Journal of the Sociology of Law
Int Rev Law and Econ	International Review of Law and Economics
JBL	Journal of Business Law
Jo Law and Economics	Journal of Law and Economics
Jo Law and Society	Journal of Law and Society
Jo of Political Economy	Journal of Political Economy
JP	Justice of the Peace
LIEI	Legal Issues in European Integration
LQR	Law Quarterly Review
LSG	Law Society Gazette
Mich LR	Michigan Law Review
MLR	Modern Law Review
NLJ	New Law Journal
NYULRev	New York University Law Review
Oxford Jo Legal Papers	Oxford Journal of Legal Papers
Ox Rev Ec P	Oxford Review of Economic Papers

List of Abbreviations (cont)

PL	Public Law
Q Jo Econ	Quarterly Journal of Economics
SJ	Solicitors Journal
Southern California LR	Southern California Law Review
Texas LR	Texas Law Review
Un Penn LR	University of Pennsylvania LawReview
Utah LR	Utah Law Review
Virginia LR	Virginia Law Review
Washington Unv LQ	Washington University Law Quarterly
Wisconsin LR	Wisconsin Law Review
Yale LJ	Yale Law Journal
YBEL	Yearbook of European Law

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